TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 575

WILLIAM ELMER BROWN, JR., PETITIONER,

vs.

EDWARD J. O'KEEFE, RECEIVER OF THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 18, 1936.

CERTIORARI GRANTED JANUARY 18, 1937.

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IN THE

District Court of the United States,

DISTRICT OF NEW JERSEY.

L-4392. ACTION AT LAW.

EDWARD J. O'KEEFE, RECEIVER OF THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.

v.

WILLIAM ELMER BROWN, JR.

DOCKET ENTRIES.

Mar. 26, 1934.	Summons issued.
Mar. 29, 1934.	Affidavit of Merits filed.
Apr. 2, 1934.	Summons and Complaint returned, served March 28, 1934, filed.
Apr. 12, 1934.	Answer filed.
Apr. 18, 1934.	Notice of Fixing Place for trial filed (Camden).
Dec. 7, 1934.	Notice of Motion for entry of Summary Judgment and Affidavit filed.
Dec. 14, 1934.	Order continuing return day of Notice of Motion, filed.
Jan. 17, 1935.	Order continuing return day of Notice of Motion, filed.
Mar. 8, 1935.	Order continuing return day of Notice of Motion, filed.
Apr. 13, 1935.	Hearing on motion for Summary Judgment. Decision Reserved (J. Avis).

Apr. 13, 1935.	Affidavit of Defendant, filed.
Apr. 13, 1935.	Affidavit of Plaintiff, filed.
Apr. 24, 1935.	Order Substituting Party Plaintiff, filed.
July 19, 1935.	Memorandum filed (J. Avis).
July 23, 1935.	Order Striking Answer and for Summary Judgment for Plaintiff for $1092. and Costs, filed.
Sept. 4, 1935.	Exception filed.
Sept. 10, 1935.	Notice of Appeal filed.
Sept. 10, 1935.	Assignment of Errors filed.
Sept. 10, 1935.	Petition of Appeal filed.
Sept. 10, 1935.	Order Allowing Appeal filed.
Sept. 10, 1935.	Bond filed.
Sept. 10, 1935.	Citation issued.
Sept. 13, 1935.	Citation returned, service acknowledged September 12. Copy filed.

COMPLAINT.

(Filed April 2, 1934.)

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF NEW JERSEY.

ACTION AT LAW.

Laurence A. Slaughter, Receiver of the Union National Bank of Atlantic City, N. J.,
Plaintiff,

v.

William Elmer Brown, Jr.,
Defendant.

Laurence A. Slaughter, Receiver of the Union National Bank of Atlantic City, N. J., complains and says:

1. That the Union National Bank of Atlantic City, N. J., is a national banking corporation organized under and by virtue of the National Banking Laws of the United States of America, and prior to the thirtieth day of September, A. D. 1931, was engaged in the general banking business, having its principal office in the city of Atlantic City, County of Atlantic and State of New Jersey.

2. That on the thirteenth day of December, A. D. 1933, complainant was appointed receiver of the Union National Bank of Atlantic City, N. J., by the Comptroller of the Currency of the United States of America, and duly qualified and took upon himself the burden of administering the affairs of said bank, and

ever since said date has been and now is the appointed, qualified and acting receiver thereof.

3. That on and prior to the thirteenth day of December, A. D. 1933, William Elmer Brown, Jr., the defendant in this suit, was and still is the owner of ten (10) shares of the capital stock of the Union National Bank of Atlantic City, N. J., of the par value of $100 per share, as shown by the books of said bank.

4. That on or about the eighth day of January, A. D. 1934, the Comptroller of the Currency of the United States duly found and determined that in order to pay the debts of the said Union National Bank of Atlantic City, N. J., it is necessary to enforce the individual liability of the stockholders thereof to the extent of $100 upon each and every share of the capital stock of said association as provided by law.

5. That on or about the eighth day of January, A. D. 1934, the said Comptroller, in the manner and as by law provided, did make said assessment upon the shares of the stock of said association, including the shares owned by the said defendant, as shown by the books of said bank; and did direct plaintiff, as receiver of the Union National Bank of Atlantic City, N. J., to take all necessary proceedings by suit or otherwise to enforce the extent of the said individual liability of the stockholders of said bank.

6. That due and timely notice of said assessment was given to said defendant and demand made upon him to pay the amount of his said assessment, but the said defendant neglects and refuses to pay the same.

7. That this suit is prosecuted by an officer of the United States of America to enforce the liability fixed and prescribed by the laws of the United States in an

effort to wind up the affairs of a national banking association, and this Court has jurisdiction of the subject matter thereof.

8. That by virtue of the premises and of the statutes in such case made and provided, the said defendant became and is indebted to plaintiff in the sum of $1000, together with interest thereon at 6 per cent. per annum from the eighth day of January, A. D. 1934.

WHEREFORE, a cause of action has arisen in favor of this plaintiff against the defendant, William Elmer Brown, Jr., and plaintiff demands damages in the sum of $1000, together with interest thereon at 6 per cent. per annum from the eighth day of January, A. D. 1934.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

To the within named defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of the service hereof upon you, and that unless you file such affidavit, judgment by default will be entered against you at the end of said ten days, and that, in case you file said affidavit, unless you file an answer within twenty days from the date of service hereof upon you, judgment by default will in such case be entered against you at the end of said twenty days.

(Note—Lawful service upon a corporation defendant is personal service for the above purpose.)

BOURGEOIS & COULOMB,
Attorneys.

ANSWER.

(Filed April 12, 1934.)

William Elmer Brown, Jr., the defendant in the above-entitled cause, answering the plaintiff's complaint filed herein, says that:

1. He admits paragraph 1.

2. He admits paragraph 2.

3. He denies paragraph 3.

4. He admits paragraph 4.

5. He admits paragraph 5 except that he denies that he was the owner of any shares of the stock of said association at the time of said assessment.

6. He admits that notice of said assessment was given to him; that demand was made upon him to pay said assessment; and that he has refused to pay same.

7. He admits paragraph 7.

8. He denies paragraph 8.

FIRST DEFENSE.

1. On April 21, 1933, defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey and all right, title and interest of the defendant in and to the said ten shares of stock by act of law was immediately transferred to and vested in the trustee duly appointed for said defendant bankrupt, whereupon the defendant lost all dominion and control over the said shares of stock.

2. Said trustee has not disclaimed title to the said ten shares of stock to defendant.

3. At the date of the assessment levied as aforesaid defendant in law and in fact was not the legal or equitable owner of said ten shares of the stock of said Union National Bank of Atlantic City, N. J., upon which said assessment was levied.

4. The title to said stock was transferred to and vested in the said trustee by act of law more than sixty days prior to the appointment of the said receiver.

SECOND DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

THIRD DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. The defendant's liability for assessment upon the said ten shares of stock of the Union National Bank of Atlantic City, N. J., was a provable debt or claim at the time of defendant's adjudication and discharge in bankruptcy.

FOURTH DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. The defendant's liability for assessment upon the said ten shares of stock of the Union National Bank of Atlantic City, N. J., was as surety and was provable against defendant's bankrupt estate at the time of his adjudication and discharge.

FIFTH DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union

National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. The defendant's liability for assessment upon the said ten shares of stock of the Union National Bank of Atlantic City, N. J., was a debt or liability founded upon an implied contract and was provable at the time of defendant's adjudication and discharge in bankruptcy.

SIXTH DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. The defendant's liability for assessment upon the said ten shares of stock of the Union National Bank of Atlantic City, N. J., had accrued at the time of and prior to defendant's discharge in bankruptcy as aforesaid and was then a provable debt or claim.

SEVENTH DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United Stats District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. Prior to defendant's adjudication and discharge in bankruptcy said the Union National Bank of Atlantic City, N. J., had become insolvent and had closed its doors for business and therefore defendant's liability on his aforesaid stock was then fixed and provable.

EIGHTH DEFENSE.

1. On or about September 30, 1931, the Union National Bank of Atlantic City, N. J., discontinued business, went into liquidation and was closed all in accordance with the law in such cases made and provided.

2. By agreement entered into between said the Union National Bank of Atlantic City and the Atlantic City National Bank, a banking corporation of the United States of America, having its principal place of business at Atlantic City, N. J., dated September 30, 1931, said the Atlantic City National Bank was designated as the liquidating agent of and for the said the Union National Bank of Atlantic City and said the Atlantic City National Bank then and there immediately entered into possession of all property and assets of said the Union National Bank of Atlantic City.

3. On or about the aforesaid date, and in accordance with the terms of the aforesaid agreement and understanding, all of the deposit accounts of the Union National Bank of Atlantic City became and were merged and mingled with the deposit accounts of the said the Atlantic City National Bank.

4. On January 30, 1933, the Atlantic City National Bank was declared insolvent by the Comptroller of the Currency of the United States of America and Laurence A. Slaughter, who, as receiver of the Union National Bank of Atlantic City, is the plaintiff herein, was duly appointed receiver of said the Atlantic City National Bank and immediately entered into possession of the property and assets of the Union National Bank of Atlantic City under the terms and provisions of said agreement dated September 30, 1931, as well as the property and assets of said the Atlantic City National Bank.

5. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

6. On July 31, 1933, this defendant was discharged of all of his debts and claims.

7. The said ten shares of stock of the Union National Bank of Atlantic City mentioned in plaintiff's complaint were included in the schedule of assets filed by this defendant in said bankruptcy proceeding and this defendant's liability for assessment on the said stock was listed among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

8. Defendant's said liability for assessment on said stock, at the time of his aforesaid adjudication and discharge, was a provable debt or liability fixed, ascertainable or capable of liquidation.

NINTH DEFENSE.

1. On September 30, 1931, the Union National Bank of Atlantic City, N. J., was placed in voluntary liquidation under and by virtue of the law in such cases made and provided and the Atlantic City National Bank was appointed liquidating agent therefor.

2. On January 30, 1933, the Atlantic City National Bank was declared insolvent by the Comptroller of the Currency of the United States of America and Laurence A. Slaughter, who, as receiver of the Union National Bank of Atlantic City, is the plaintiff herein, was duly appointed receiver of said the Atlantic City National Bank and immediately entered into possession of the property and assets of the Union National Bank of Atlantic City under the terms and provisions of said agreement dated September 30, 1931, as well as the

property and assets of said the Atlantic City National Bank.

3. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

4. On July 31, 1933, this defendant was discharged of all of his debts and claims.

5. The said ten shares of stock of the Union National Bank of Atlantic City mentioned in plaintiff's complaint were included in the schedule of assets filed by this defendant in said bankruptcy proceeding and this defendant's liability for assessment on the said stock was listed among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

6. Defendant's said liability for assessment on said stock, at the time of his aforesaid adjudication and discharge, was a provable debt or liability fixed, ascertainable or capable of liquidation.

TENTH DEFENSE.

1. On or about December 15, 1931, said the Union National Bank of Atlantic City, N. J., went into liquidation and became closed in accordance with the authority and provisions of the law in such cases made and provided and said the Atlantic City National Bank was appointed liquidating agent therefor.

2. On January 30, 1933, the Atlantic City National Bank was declared insolvent by the Comptroller of the Currency of the United States of America and Laurence A. Slaughter, who, as receiver of the Union Union National Bank of Atlantic City, is the plaintiff herein, was duly appointed receiver of said the Atlantic

City National Bank and immediately entered into possession of the property and assets of the Union National Bank of Atlantic City under the terms and provisions of said agreement dated September 30, 1931, as well as the property and assets of said the Atlantic City National Bank.

3. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

4. On July 31, 1933, this defendant was discharged of all of his debts and claims.

5. The said ten shares of stock of the Union National Bank of Atlantic City mentioned in plaintiff's complaint were included in the schedule of assets filed by this defendant in said bankruptcy proceeding and this defendant's liability for assessment on the said stock was listed among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

6. Defendant's said liability for assessment on said stock, at the time of his aforesaid adjudication and discharge, was a provable debt or liability fixed, ascertainable or capable of liquidation.

ELEVENTH DEFENSE.

1. On or about September 30, 1931, the Union National Bank of Atlantic City, N. J., sold all of its property and assets to said the Atlantic City National Bank for a definite and fixed consideration to be paid by the assumption of all liabilities of said the Union National Bank then existing except liabilities to shareholders as such.

2. By the agreement then made between them said the Union National Bank agreed to pay to said the

Atlantic City National Bank, upon demand, a sum equal to any loss which it might sustain by reason of the assets so sold, liquidating less than the value herein placed upon them, with interest until liquidated.

3. Promptly after the transfer of said assets as aforesaid, said the Atlantic City National Bank paid all the liabilities of said the Union National Bank as agreed.

4. As a result of the transfer of said assets and the assumption and payment of said liabilities as aforesaid, said the Union National Bank of Atlantic City, N. J., thereafter had no debts, claims or liabilities outstanding and owing by it except such as it might thereafter have to said the Atlantic City National Bank under and by virtue of the terms of the aforesaid agreement.

5. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

6. On July 31, 1933, this defendant was discharged of all his debts and claims.

7. The said ten shares of stock of the Union National Bank of Atlantic City mentioned in plaintiff's complaint were included in the schedule of assets filed by this defendant in said bankruptcy proceedings and this defendant's liability for assessment on the said stock was listed among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

8. Defendant's liability for assessment on said stock for the payment of any debt or liability due to said the Atlantic City National Bank from said the Union National Bank was a provable debt or claim ascertainable or capable of liquidation at the time of defendant's adjudication and discharge as aforesaid.

TWELFTH DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. Prior to defendant's adjudication and discharge as aforesaid said the Union National Bank went into liquidation and became closed in accordance with the authority and provisions of the law in such cases made and provided and said the Atlantic City National Bank was appointed liquidating agent therefor.

7. Defendant's liability for assessment on said stock for the payment of any debt or liability due to said the Atlantic City National Bank, as liquidating agent or otherwise, or to any other creditor was a provable debt or claim ascertainable or capable of liquidation at the time of defendant's adjudication and discharge as aforesaid.

THIRTEENTH DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. Prior to defendant's adjudication and discharge as aforesaid said the Union National Bank went into liquidation and became closed in accordance with the authority and provisions of the law in such cases made and provided and said the Atlantic City National Bank was appointed liquidating agent therefor.

7. Defendant's liability for assessment on said stock for the payment of any debt or liability due to said the Atlantic City National Bank as liquidating agent or otherwise, or to any other creditor was capable of being enforced at the time of defendant's adjudication and discharge as aforesaid.

BOLTE & TRIPICIAN,
Attorneys for Defendant.

NOTICE OF MOTION AND AFFIDAVITS.

(Filed December 7, 1934.)

To Bolte & Tripician, Esqs., Attorneys for Defendant,

Sirs:

TAKE NOTICE, that on Friday, the fourteenth day of December, A. D. 1934, at ten-thirty o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall make application to his Honor, John Boyd Avis, Judge of the above-stated court, or such other Judge as may be holding said court, at the United States Court House, Fourth and Market Strets, Camden, New Jersey, to strike the answer filed by you on behalf of said defendant upon the grounds:

(A) That said answer is sham, in that on and prior to the thirteenth day of December, A. D. 1933, William Elmer Brown, Jr., the defendant in this suit, was and the said William Elmer Brown, Jr., defendant, still is the owner of ten (10) shares of the capital stock of the Union National Bank of Atlantic City, N. J., of the par value of $100 per share, as shown by the books of said bank, which said allegation you deny in the answer filed by you on behalf of said defendant; said answer is further sham, in that on or about the eighth day of January, A. D. 1934, the Comptroller of the Currency of the United States of America in the manner and as by law provided, did, in fact make an assessment upon the shares of stock of the said the Union National Bank of Atlantic City, N. J., including the shares owned by the said defendant, William Elmer Brown, Jr., as shown by the books of said bank, and said Comptroller did in fact direct plaintiff as receiver of the Union National Bank of Atlantic City, N. J., to take all necessary proceedings by suit or otherwise to enforce the extent of the said individual liability of the stockholders of said bank,

which allegation you also deny in the answer filed by you on behalf of said defendant; that said answer is further sham, in that the said defendant is in fact and in law justly and truly indebted to the plaintiff herein in the sum of $1000, together with interest thereon at 6 per cent. per annum from the eighth day of January, A. D. 1934, on said assessment, which allegation you also deny in the answer filed by you on behalf of said defendant.

(B) That the first defense in said answer is in part sham, in that the said Trustee did in fact on or about the twenty-seventh day of October, 1933, disclaim title to said ten (10) shares of the capital stock of the Union National Bank of Atlantic City, N. J., and on the date of said assessment, the said defendant was in law and in fact the legal owner of said ten (10) shares of the stock of said the Union National Bank of Atlantic City, N. J., upon which said assessment was levied.

(C) That the second defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and said defense is therefore insufficient in law to constitute and does not on its face disclose a valid defense in law to plaintiff's complaint.

(D) That the third defense is frivolous, in that the said defendant's adjudication and discharge in bankruptcy does not relieve him from responsibility for this assessment, and defendant's liability for said assessment was not a provable debt or claim at the time of the defendant's adjudication or discharge in bankruptcy; and said defense is therefore insufficient in law to constitute and does not on its face disclose a valid defense in law to plaintiff's complaint.

(E) That the fourth defense is frivolous, in that defendant's adjudication and discharge in bankruptcy

does not relieve him of responsibility for said assessment, and said defendant's liability for said assessment was not as surety and was not provable against defendant's estate in bankruptcy at the time of his adjudication or discharge; and said defense is therefore insufficient in law to constitute and does not on its face disclose a valid defense in law to plaintiff's complaint.

(F) That the fifth defense is frivolous, in that defendant's adjudication and discharge in bankruptcy does not relieve him of responsibility for said assessment, and said defendant's liability for said assessment was not at the time of defendant's adjudication or discharge in bankruptcy a debt or liability founded upon an implied contract and provable at the time of the defendant's adjudication or discharge in bankruptcy within the meaning and intent of the Act of Congress, and said defense is therefore insufficient in law to constitute and does not on its face disclose a valid defense in law to plaintiff's complaint.

(G) That the sixth defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and said defendant's liability for assessment did not in law accrue at the time of or prior to defendant's discharge in bankruptcy, and was, therefore, not a provable debt or claim, and said defense is therefore insufficient in law to constitute and does not on its face disclose a valid defense in law to plaintiff's complaint.

(H) That the seventh defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller

of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and provided, no liability attached to the said defendant by reason of his ownership of said shares.

(I) That the eighth defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and provided, no liability attached to the said defendant by reason of his ownership of said shares.

(J) That the ninth defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and pro-

vided, no liability attached to the said defendant by reason of his ownership of said shares.

(K) That the tenth defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and provided, no liability attached to the said defendant by reason of his ownership of said shares.

(L) That the eleventh defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and provided, no liability attached to the said defendant by reason of his ownership of said shares.

(M) That the twelfth defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for

said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and provided, no liability attached to the said defendant by reason of his ownership of said shares.

(N) That the thirteenth defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and provided, no liability attached to the said defendant by reason of his ownership of said shares, and

TAKE FURTHER NOTICE, at said time and place, we shall make application for the entry of summary judgment herein; and attached hereto are copies of the affidavits upon which said application will be made.

Dated November 27, 1934.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

AFFIDAVITS.

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

LAURENCE A. SLAUGHTER, of full age, being duly sworn, according to law upon his oath, deposes and says:

1. I am the plaintiff in this action which is brought by me as receiver of The Union National Bank of Atlantic City, N. J., to recover of the defendant the sum of $1000, together with interest thereon at six per cent. per annum from January 8, 1934, the particulars whereof are as follows:

A. Prior to the thirteenth day of January, A. D. 1933, the defendant, William Elmer Brown, Jr., was the owner of ten (10) shares of the capital stock of The Union National Bank of Atlantic City, N. J., a banking association organized under the laws of the United States of America, located in the City of Atlantic City, County of Atlantic and State of New Jersey.

B. On or about the thirteenth day of December, A. D. 1933, the said The Union National Bank of Atlantic City, N. J., became and was by the Comptroller of the Currency of the United States declared insolvent and ordered closed, and on said date, deponent was by said Comptroller of the Currency of the United States appointed receiver thereof. A true copy of the determination of said Comptroller of the Currency declaring said The Union National Bank of Atlantic City, N. J., insolvent, and appointing deponent as receiver thereof is annexed hereto and made a part hereof, the same being marked "Schedule 1". Said original determination and appointment, or a duly certified copy thereof, will be produced at the argument of this motion.

C. On or about the eighth day of January, A. D. 1934, the said Comptroller of the Currency, by virtue

of the authority vested in him by law and in the manner required by law, did make an assessment and requisition upon the shareholders of the said The Union National Bank of Atlantic City, N. J., for $100,000 to be paid by them on or before the fifteenth day of February, 1934, and did thereby make demand upon each and everyone of the shareholders of said bank for the par value of each and every share of the capital stock of said association held or owned by them respectively; and said Comptroller did direct deponent to take all necessary proceedings by suit or otherwise, to enforce to that extent the said individual liability of said shareholders. A true copy of said assessment is annexed hereto and made a part hereof, the same being marked "Schedule 2". A duly certified copy of said assessment will be produced at the argument of this motion.

D. The said William Elmer Brown, Jr., is a stockholder of said The Union National Bank of Atlantic City, N. J., according to the books of said The Union National Bank of Atlantic City, N. J., and owns ten (10) shares of the capital stock thereof. The stock book of said The Union National Bank of Atlantic City, N. J., will be produced at the argument of this motion.

E. Deponent notified said defendant, William Elmer Brown, Jr., of said assessment, and did demand that said defendant pay the amount thereof assessed against him, to wit: $1000, representing an assessment of $100 per share upon each of the ten (10) shares of the capital stock of said The Union National Bank of Atlantic City, N. J., owned by the said William Elmer Brown, Jr., on the date said bank was declared insolvent and ordered closed.

F. The said defendant has neglected and refused to pay the amount of said assessment or any part thereof.

2. There is due and owing to deponent by said defendant, William Elmer Brown, Jr., upon said assessment, the sum of $1000, together with interest thereon at six per cent. per annum, from January 8, 1934.

3. Deponent believes that there is no defense to this action.

LAURENCE A. SLAUGHTER.

Sworn and subscribed to before me this twenty-fourth day of November, A. D. 1934.

FLORA J. COXE,
Notary Public of New Jersey.

SCHEDULE 1.

No. 4420

TREASURY DEPARTMENT

OFFICE OF THE COMPTROLLER OF THE CURRENCY

Washington, D. C., December 13, 1933.

WHEREAS, from information on file in this bureau, I am satisfied that "The Union National Bank of Atlantic City," located in the City of Atlantic City, County of Atlantic, and State of New Jersey, is insolvent and unable to pay its just and legal debts:

NOW, THEREFORE, I, J. F. T. O'CONNOR, Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of Section 1 of an Act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks, and for other purposes," approved June 30, 1876, do hereby appoint Laurence A. Slaughter, receiver of "The Union National Bank of Atlantic City," with all the powers, duties and responsibilities given

to or imposed upon a receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a receiver.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this thirteenth day of December, A. D. 1933.

J. F. T. O'CONNOR,
(Seal) *Comptroller of the Currency.*

CERTIFICATE FOR CERTIFIED COPY.

TREASURY DEPARTMENT,
OFFICE OF THE
COMPTROLLER OF THE
CURRENCY,
} *ss.:*

Under the provisions of Section 884 of the Revised Statutes of the United States, I. F. G. Awalt, Acting Comptroller of the Currency, do hereby certify that the foregoing is a true and complete copy of the original commission of Laurence A. Slaughter, as receiver of "The Union National Bank of Atlantic City," New Jersey, dated December 13, 1933, and signed by J. F. T. O'Connor, Comptroller of the Currency, and of the whole of such original on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this ninth day of April, A. D. 1934.

F. G. AWALT,
(Seal) *Acting Comptroller of the Currency.*

SCHEDULE 2.

ASSESSMENT UPON SHAREHOLDERS.

No. 4420

TREASURY DEPARTMENT
OFFICE OF THE COMPTROLLER OF THE CURRENCY

Washington, January 8, 1934.

In the matter of
The Union National Bank of
Atlantic City, New Jersey.

To all whom it may concern:

WHEREAS, upon a proper accounting by the receiver heretofore appointed to collect the assets of "The Union National Bank of Atlantic City," New Jersey, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1c156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as Federal Reserve Act.

NOW, THEREFORE, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The Union National Bank of Atlantic City," for one hundred thousand ($100,000.00) dollars, to be paid by them on or before the fifteenth day of February, 1934, and I hereby make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Laurence A. Slaughter, the receiver here-

tofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

IN WITNESS WHEREOF I have hereto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this eighth day of January, A. D. 1934.

J. F. T. O'CONNOR,
(Seal) *Comptroller of the Currency.*

CERTIFICATE FOR CERTIFIED COPY.

TREASURY DEPARTMENT,
OFFICE OF THE
COMPTROLLER OF THE
CURRENCY,
} *ss.:*

Under the provisions of the Section 884 of the Revised Statutes of the United States, I. F. G. Awalt, Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original order of assessment upon shareholders of "The Union National Bank of Atlantic City," New Jersey, insolvent, for the par value of each share, levied under date of January 8, 1934, and signed by J. F. T. O'Connor, Comptroller of the Currency, and of the whole of such original on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this twenty-eighth day of May, A. D. 1934.

F. G. AWALT,
(Seal) *Acting Comptroller of the Currency.*

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

CLARENCE E. KNAUER, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. On the eighth day of May, 1933, I was duly appointed Trustee in Bankruptcy of the Estate of William Elmer Brown, Jr., bankrupt.

2. Thereafter, as such Trustee, I proceeded with the administration of the estate of said bankrupt.

3. As said Trustee, there came into my hands ten (10) shares of the capital stock of the Union National Bank of Atlantic City, N. J., which said shares were registered in the name of William Elmer Brown, Jr.

4. After investigation, I concluded that there was no equity in said ten (10) shares of stock; and that said ten (10) shares of stock would be burdensome to the bankrupt estate which I was administering.

5. Accordingly, I prepared a petition to the Honorable Robert E. Steedle, referee in bankruptcy, for authority to abandon all title to and disclaim all the interest of said bankrupt in said ten (10) shares of stock.

6. In pursuance to the prayer of said petition, the said Honorable Robert E. Steedle, referee in bankruptcy, did, on the twenty-seventh day of October, 1933, by order bearing said date, direct me to abandon all title to and disclaim all the interest of said bankrupt in said ten (10) shares of stock. A true copy of said order is annexed to this affidavit and made a part hereof.

CLARENCE E. KNAUER.

Sworn and subscribed to before me this twenty-third day of November, A. D. 1934.

FRANCES DOLIN,
A Notary Public of N. J.

(Copy)

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF NEW JERSEY.

IN BANKRUPTCY.

In the Matter of
William Elmer Brown, Jr.,
Bankrupt.

ORDER TO ABANDON.

Clarence E. Knauer, Trustee of the above-named bankrupt, having filed his petition, requesting leave to abandon certain property of the bankrupt, on the ground that there is no equity in the said property for the unsecured creditors and the same is therefore burdensome to the bankrupt estate, and it appearing that the prayer of the petition should be granted;

IT IS, therefore, on this twenty-seventh day of October, A. D. 1933, ORDERED that the said Clarence E. Knauer, Trustee of the said William Elmer Brown, Jr., bankrupt, be and he is hereby authorized and directed to abandon all title to and to disclaim all the interest of the bankrupt in the following:

Ten shares of Union National Bank stock.

ROBERT E. STEEDLE,
Referee in Bankruptcy.

Service of a copy of the within notice of motion and affidavits is hereby acknowledged this twenty-seventh day of November, A. D. 1934.

BOLTE & TRIPICIAN,
Attorneys for Defendant.

AFFIDAVIT.

(Filed April 13, 1935.)

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF NEW JERSEY.

ACTION AT LAW.

ON MOTION FOR SUMMARY JUDGMENT.

Laurence A. Slaughter, Receiver of the Union National Bank of Atlantic City, New Jersey,
Plaintiff,

v.

William Elmer Brown, Jr.,
Defendant.

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

WILLIAM ELMER BROWN, JR., of full age, being duly sworn according to law, deposes and says:

1. I am the defendant named in the above-entitled cause.

2. Union National Bank of Atlantic City, New Jersey, of which the above-named Laurence A. Slaughter is receiver, is a banking corporation organized under the laws of the United States of America.

3. On September 30, 1931, said Union National Bank of Atlantic City was insolvent and, therefore, unable to continue its business. To avoid imminent

disaster and the calamitous result to other financial institutions of Atlantic City said bank did, therefore, on that date, enter into a written agreement with the Atlantic City National Bank, also a banking corporation of the United States of America, a copy of which contract is attached hereto, marked Exhibit 1 and by this reference is made a part hereof. I am informed from such source that I believe it to be true and therefore aver that as a further indemnity against loss to said Atlantic City National Bank certain of the directors of the Union National Bank assumed individual liabilities to said Atlantic City National Bank, limited in each instance to the sum of $8000. Said individual liabilities were assumed at the time and in connection with the execution of the aforesaid agreement between said two banks and as evidence of said liabilities said directors executed and delivered promissory notes. Also I am informed from such source that I believe it to be true and therefore aver that as a further inducement and consideration to said Atlantic City National Bank to assume the obligations and duties provided for by the aforesaid agreement with said Union National, certain of the banks and financial institutions of Atlantic City then contributed to a fund totaling $100,000 (of which sum the Atlantic City National Bank was to assume $20,000) for the purpose of further indemnifying said Atlantic City National Bank against loss as the result of the obligations assumed by it under said agreement. Said guarantees of said individual directors and the creation of the said fund of $100,000 was required by said Atlantic City National Bank by reason of the then insolvent status of said Union National Bank and the then apparent lack of sufficient value of assets of said Union National Bank to equal the total liabilities which were being assumed by said Atlantic City National Bank.

4. Thereafter and on or about said September 30, 1931, said Union National Bank of Atlantic City discontinued business and it and the said the Atlantic City National Bank proceeded to perform and do the things which they had agreed to perform and do in the aforesaid agreement. Accordingly said Union National Bank delivered all of its assets to said the Atlantic City National Bank and the latter took possession thereof. Also said the Atlantic City National Bank then and there assumed all of the liabilities of said Union National Bank.

5. At the time aforesaid the liabilities of said Union National Bank consisted of current operation expenses, depositors accounts and moneys borrowed from correspondent banks.

6. I am informed from such source that I believe it to be true and, therefore, depose and say that promptly after the transfer of said assets as aforesaid said the Atlantic City National Bank paid all the liabilities of said Union National Bank as agreed.

7. As a result of the transfer of said assets and the assumption and payment of said liabilities as aforesaid, said Union National Bank thereafter had no debts, claims or liabilities outstanding and owing by it except such as it might thereafter have to said the Atlantic City National Bank under and by virtue of the terms of the aforesaid agreement.

8. At a special meeting of shareholders of the Union National Bank of Atlantic City, New Jersey, held on the afternoon of December 15, 1931, a resolution was regularly adopted and passed of which the following is an excerpt:

"Resolved that the Union National Bank of Atlantic City, New Jersey, be placed in voluntary

liquidation under the provisions of Sections 5220 and 5221 of the United States Revised Statutes, to take effect December 15, 1931, and that the Atlantic City National Bank be appointed liquidating agent or liquidation committee of said bank;'' &c.

9. Thereafter said Union National Bank notified the Comptroller of the Currency of the United States of its intention to dissolve and go into liquidation and notice thereof was given in the form and manner required by law.

10. Also at said meeting of stockholders of said Union National Bank of Atlantic City held on December 15, 1931, the aforesaid agreement of September 30, 1931, was ratified and approved.

11. On January 30, 1933, the Atlantic City National Bank was declared insolvent by the Comptroller of the Currency of the United States and Laurence A. Slaughter, who, as receiver of the Union National Bank of Atlantic City, is the plaintiff herein, was duly appointed receiver of said the Atlantic City National Bank and immediately entered into possession of the property and assets of the Union National Bank of Atlantic City under the terms and provisions of said agreement dated September 30, 1931, as well as the property and assets of said the Atlantic City National Bank and has ever since then been administering the affairs of said the Atlantic City National Bank.

12. On April 21, 1933, I was adjudicated a bankrupt by order of this Court.

13. On July 31, 1933, I was discharged of all of my debts and claims.

14. The ten shares of stock of the Union National Bank of Atlantic City referred to in the complaint

filed in this cause by plaintiff were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City was included in the list of creditors filed therein.

15. I also stated my liability for assessment on the said ten shares of stock among the various debts and liabilities then existing against me and from the payment of which I asked to be discharged.

16. Said Atlantic City National Bank and said Laurence A. Slaughter, its receiver, were included in the list of creditors filed by me in said bankruptcy proceedings and had due and timely notice thereof.

17. On or about December 13, 1933, the said Union National Bank of Atlantic City was declared insolvent by the Comptroller of the Currency of the United States of America and on said date said Laurence A. Slaughter was appointed by said Comptroller to act as receiver thereof.

18. At the time that I was adjudicated a bankrupt as aforesaid it had been determined and from then until now it has been definitely determined and known that said Union National Bank was insolvent. Said Union National Bank was throughout all of that time and ever since September 30, 1931, had been closed to business. Also at said time it had been determined and throughout said period it was definitely known that the assets of said Union National Bank were insufficient in value to liquidate at a sum equal to the value placed upon them by said agreement of September 30, 1931.

19. Also at the time that I was adjudicated a bankrupt as aforesaid it had been determined and from then until now it has been definitely determined and known that an assessment and requisition upon the

shareholders of said Union National Bank to the total par value of the amount of stock outstanding would be necessary to pay the debts and claims of said bank.

20. The facts stated in the eighteenth and nineteenth paragraphs of this affidavit were well known to the said Laurence A. Slaughter at the time I was adjudicated a bankrupt and for a long time prior to his appointment as receiver of said Union National Bank as aforesaid. This is verified by the fact that some time prior to his appointment as aforesaid he the said Laurence A. Slaughter, as receiver of Atlantic City National Bank, Trustee of Edwin J. Holland, filed in the Court of Chancery of New Jersey an accounting of receipts and disbursements of said Trustee wherein he did claim allowance for disbursement noted as follows: "Less amount assessed by Laurence A. Slaughter, Receiver of Atlantic City National Bank, successor to Union National Bank by merger on 1 share Union National Bank stock, $100."

WILLIAM ELMER BROWN, JR.

Sworn and subscribed to before me this sixth day of March, 1935.

EDNA C. HELLER,
Notary Public of New Jersey.
My commission expires January 12, 1936.

EXHIBIT 1.

AGREEMENT made this Thirtieth day of September, Nineteen hundred and thirty-one, between ATLANTIC CITY NATIONAL BANK, a Banking Corporation of the United States of America, (hereinafter called Buyer); and UNION NATIONAL BANK OF ATLANTIC CITY, NEW JERSEY, a like corporation, (hereinafter called Seller), WITNESSETH:

In consideration of the payment by Buyer to Seller of the sum of SIXTEEN HUNDRED EIGHTY-SIX THOUSAND NINE HUNDRED SEVENTY-SEVEN and 63/100 ($1,686,977.63) DOLLARS, which is to be paid by the assumption of all liabilities of Seller as shown by its books at the close of business this day amounting to $1,686,977.63 except liabilities to shareholders as such, Seller hereby sells, transfers and assigns unto Buyer, all of its real estate, bills and notes receivable, cash, mortgages, bonds and stocks, and all property of every kind whatsoever which it owns or in which it has any interest, delivery to be made herewith.

Seller covenants that the assets sold and conveyed hereby are of the full value above set forth, and hereby agrees to pay upon demand to Buyer a sum equal to any loss which Buyer may sustain by reason of the assets so sold, liquidating less than the value herein placed upon them, with interest until liquidated.

The banking house and fixtures of Seller are taken at the valuation of $353,000.00, and no loss shall be claimed by Buyer by reason of said real estate and fixtures proving worth less than that sum.

Buyer shall keep a separate account of the assets herein purchased and its acceptance of renewals or part payments of any note or notes herein purchased shall not be considered as an assumption by Buyer of any eventual loss on such note or notes which it may sustain, so as to relieve Seller from liability for the deficiency.

The amount of the liability of Seller shall be fixed at the expiration of two years from this date, at which time all notes, regardless of renewals thereof, which shall then be uncollected by Buyer, shall be deemed losses.

Seller agrees to execute and deliver from time to time, such deeds, conveyances, assignments, endorsements and other documents as shall require the execu-

tion of the Seller in order to effectuate the purchase of this agreement.

IN WITNESS WHEREOF, the Atlantic City National Bank has caused these presents to be signed by its President and its corporate seal to be hereto attached duly attested by its Vice President, and Union National Bank of Atlantic City, New Jersey, has caused these presents to be signed by its Vice President and its corporate seal to be attached duly attested by its Cashier, all the day and year first above written.

ATLANTIC CITY NATIONAL BANK

By: (S) JOHN C. SLAPE
President.

UNION NATIONAL BANK OF ATLANTIC CITY, NEW JERSEY

By (S) EDWARD C. RYON
Vice President.

Signed, sealed and delivered
in the presence of:

ATTEST:

(S) L. E. CONOVER, JR.
Vice President.

ATTEST:

(S) GEORGE F. WINGATE
Cashier.

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

BE IT REMEMBERED, That on this 30th day of September in the year of our Lord, one thousand nine hundred and thirty-one, before me a Master in Chancery of New Jersey personally appeared LEMUEL E. CONOVER, JR., who being duly sworn, on his oath made due proof, to my satisfaction, that John C. Slape is President and deponent is Vice President of the ATLANTIC CITY NATIONAL BANK, Corporation grantee in the within agreement; that deponent well knows the common seal of said Corporation; that the seal affixed to said agreement is the common seal of said Corporation and was so affixed thereto and said agreement was signed and delivered by said President in the presence of deponent, as the voluntary act and deed of said Corporation, pursuant to resolution of the Directors thereof, and that deponent thereupon signed his name thereto as a witness thereof.

(S) LEMUEL E. CONOVER, JR.

Sworn and subscribed before me the day and year aforesaid. All of which I do hereby certify.

(S) JOHN E. ISZARD
M. C. C. of N. J.

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

BE IT REMEMBERED, That on this 30th day of September in the year of our Lord, one thousand nine hundred and thirty-one, before me a Master in Chancery of New Jersey, personally appeared George F. Wingate who being duly sworn, on his oath made due proof, to my satisfaction, that Edward C. Ryon is Vice President and deponent is Cashier of the UNION NATIONAL BANK OF ATLANTIC CITY, NEW JERSEY, Corporation Grantor in the within agreement; that deponent well knows the common seal of said Corporation; that the seal affixed to said agreement is the common seal of said Corporation and was so affixed thereto and said agreement was signed and delivered by said President in the presence of deponent, as the voluntary act and deed of said Corporation, pursuant to resolution of the Directors thereof, and that deponent thereupon signed his name thereto as a witness thereof.

(S) GEORGE F. WINGATE.

Sworn and subscribed before me the day and year aforesaid. All of which I do hereby certify.

(S) JOHN E. ISZARD
M. C. C. of N. J.

SUPPLEMENTAL AFFIDAVIT OF PLAINTIFF.

(Filed April 13, 1935.)

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

LAURENCE A. SLAUGHTER, of full age, being duly sworn according to law, on his oath, deposes and says:

1. I submit this affidavit by way of supplement to the original affidavit heretofore filed by me and for the purpose of answering several of the allegations contained in the answering affidavit filed on behalf of the defendant.

2. It is not true as averred in paragraph 3 of the affidavit filed by the defendant that as a further indemnity against the loss to the Atlantic City National Bank for the execution of said agreement, dated September 30, 1931, that certain directors of the Union National Bank assumed individual liabilities to said Atlantic City National Bank, limited in each instance to the sum of $8000, for which said directors executed and delivered promissory notes. The true facts of the situation are as follows:

The directors of the Union National Bank had agreed to purchase from the Atlantic City National Bank certain parcels of real estate, which the latter had acquired from the Union National Bank by virtue of the agreement dated September 30, 1931 for the sum of $80,000, for which each director (there being ten in number) was to give his individual note in the sum of $8000 to the Atlantic City National Bank. The said ten directors had contemplated forming a corporation to which said real estate was to be conveyed in consideration of the issuance to each of said directors of one-tenth of the capital stock of said corporation, which stock, when so issued, was to be assigned to the Atlantic City National Bank as collateral security for the pay-

ment of said ten promissory notes. The contemplated corporation was never organized and no conveyance of the property in question was made, so that the legal title thereto always remained and is still vested in the Atlantic City National Bank. Only seven of the said ten directors made and delivered their respective promissory notes for $8000 each, and only one of said promissory notes, to-wit: one executed Edward C. Ryan was paid, and this note was paid by applying a deposit liability of the Atlantic City National Bank to the said Edward C. Ryan in satisfaction of the amount of said note, said Edward C. Ryan, at that time, being dead and his estate being administered by the Guarantee Trust Company of Atlantic City. I, as receiver of the Atlantic City National Bank, have recently entered into an agreement with the persons who made said several promissory notes and the executors of Edward C. Ryan, deceased, whereby I am given complete authority to operate said properties and disburse all income derived therefrom after operating expenses, etc., on account of the indebtedness evidenced by said several promissory notes, and when such indebtedness is paid, to divide the balance between the several makers of said notes, as their interest appears.

3. In paragraph 20 of defendant's affidavit, it is stated that prior to my appointment as receiver of the Union National Bank, I, as receiver of the Atlantic City National Bank, Trustee of Edwin J. Holland, filed in the Court of Chancery of New Jersey an accounting of the receipts and disbursements of said Trustee, wherein I did claim allowance for disbursements noted as follows: "Less amount assessed by Laurence A. Slaughter, Receiver of the Atlantic City National Bank, successor to Union National Bank by merger on one share Union National Bank stock, $100.00." The facts in reference

to this allegation are as follows: The Atlantic City National Bank, prior to suspension, was the successor Trustee under a certain trust indenture executed between Edwin J. Holland and the Marine Trust Company of Atlantic City. Part of the corpus of this trust consisted of one share of the capital stock of the Union National Bank. Upon the insolvency of the Atlantic City National Bank, it became disqualified further to act as Trustee under said trust indenture and I filed a petition in the Court of Chancery on behalf of the Atlantic City National Bank and myself, praying that I and said bank be discharged and released of all further duties in connection with said trust and that I be permitted to turn over the corpus of said trust and accrued income, after making a proper accounting, to the successor trustee, to-wit: The First National Bank of Absecon. My petition for discharge was filed in the Court of Chancery on December 6, 1933, which was but seven days before the Comptroller of the Currency appointed me as receiver of the Union National Bank. At the time of the filing of said petition for discharge, the several *cestui que trustent,* under said trust indenture, were all represented by John D. McMullin, Esq. At the time of the filing of said petition for discharge, I knew that the receiver would be appointed by the Comptroller of the Currency for the Union National Bank and that said Comptroller would levy an assessment upon the stockholders of said bank and I also knew that I would be appointed receiver of the Union National Bank. Therefore, in order to avoid future negotiations with the successor Trustee and, possibly, future litigation, it was agreed between me and John D. McMullin, Esq., representing all of the *cestui que trustent,* under said trust indenture, that I should deduct from the money to be turned over to the successor Trustee the amount of the assessment, which I knew would subse-

quently be levied by the Comptroller of the Currency upon the shareholders of Union National Bank. This was entirely a matter of personal agreement between myself and John D. McMullin, Esq.

LAURENCE A. SLAUGHTER,

Sworn and subscribed to before me this twelfth day of April, 1935.

FLORA J. COXE,
(Seal) *Notary Public.*

ORDER SUBSTITUTING PARTY PLAINTIFF.

(Filed April 24, 1935.)

It appearing that since the institution of this suit, the plaintiff, Laurence A. Slaughter, receiver of the Union National Bank of Atlantic City, N. J., has resigned as said receiver, and that Edward J. O'Keefe was appointed receiver of said Union National Bank of Atlantic City, N. J., by the Comptroller of the Currency, on April 16, 1935; and motion having been made to substitute the said Edward J. O'Keefe as party plaintiff herein, in the place and stead of the said Laurence A. Slaughter;

IT IS, on this twenty-fourth day of April, A. D. 1935, ORDERED, that Edward J. O'Keefe, receiver of the Union National Bank, be and he is hereby substituted as plaintiff in the place and stead of Laurence A. Slaughter, resigned.

JOHN BOYD AVIS,
Judge.

We consent to the making and entry of the above order.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.
BOLTE & TRIPICIAN,
Attorneys for Defendant.

MEMORANDUM.

(Filed July 19, 1935).

IN THE UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF NEW JERSEY.

L-4392.

ACTION AT LAW.

ON MOTION TO STRIKE ANSWER AND FOR SUMMARY JUDGMENT.

Edward J. O'Keefe, Receiver of the Union National Bank of Atlantic City, New Jersey,
Plaintiff,

v.

William Elmer Brown, Jr.,
Defendant.

BOURGEOIS & COULOMB (WILLIAM B. HUNTER of Counsel) for plaintiff;
BOLTE & TRIPICIAN for defendant.

AVIS, *District Judge:*

The receiver instituted suit against defendant based upon an assessment made by the Comptroller of the Currency against stockholders of the Union National Bank, an insolvent banking corporation. In the complaint it is alleged that defendant at the time the assessment was levied owned ten shares of the capital stock of the bank, of a par value of $100 per share. The assessment, made on January 8, 1934, was 100 per cent. The defendant's alleged liability is $1000. The answer admits all of the material allegations of the com-

plaint, but sets up thirteen separate defenses as a bar to the action. The first defense states that defendant was adjudicated a bankrupt on April 21, 1933, and that by reason thereof from that time on he was not the legal or equitable owner of said shares of stock, and consequently is not liable for the assessment. It is not necessary to discuss this defense as defendant in his brief consents that it be stricken.

Defenses "Second" to "Seventh", inclusive, are all based upon the assertion and apparent facts that defendant was, on April 21, 1933, adjudicated a bankrupt, and was duly discharged on July 31, 1933, and that defendant included the stock as an asset and his liability to assessment thereon in his scheduled list of debts.

The plaintiff moves to strike the answer and the defenses set up, claiming all of them to be frivolous or sham. It does not seem necessary to specifically set forth the various defenses interposed. Many combinations are disclosed in the items set forth, but a study thereof reveals the actual points to be as follows:

(1) That the listing of the stock as an asset, and the liability to assessment thereon as a debt, and the liability for assessment not having been excepted in the discharge, the defendant was discharged from the indebtedness.

(2) That the liability for assessment was a provable debt at the time of adjudication and discharge because—

(a) Defendant was a surety;

(b) Debt or liability was founded on implied contract;

(c) Liability had occurred at the time of and prior to defendant's discharge and was then a provable debt;

(d) Insolvency of, sale of assets, and voluntary liquidation of Union National Bank prior to adjudication and discharge, rendered the debt provable;

(e) Claim under assessment on stock was a provable debt and capable of being enforced at the time of adjudication and discharge.

As to the first question, no cases are cited in brief, and the Court has found none, which even suggest that in a case of this character the court has any right to except from discharge any debts of the bankrupt. The statute (11 U. S. C. A. sec. 35) provides that the discharge "shall release the bankrupt from all of his provable debts," except such as are particularly scheduled therein.

In Remington on Bankruptcy (4th ed.), vol. 7, sec. 3440, it is set forth:

> "In some reported cases, the bankruptcy court, in granting a discharge, uses language indicating that it considers it to be within the court's function, when the discharge is granted, to limit or qualify its effect.
>
> Notably is this so in regard to individual bankruptcies where the individual bankrupt is also a member of a partnership, the courts sometimes attempting to qualify the order of discharge by limiting it to individual debts. However, in general, the bankruptcy court in granting a discharge should not attempt to limit the effect of the discharge, the sole function of the court being to grant or refuse the discharge, the law itself then fixing the extent and effect of the discharge. Thus, in cases of individual bankruptcies, the discharge should be, in the words of the form of the order, 'from all provable debts excepting those excepted' by the statute. If, then, the statute does not except partnership debts, the court should not attempt to do so."
>
> (Pages 667-8.)

The mere fact of scheduling and the failure to except the claim in discharge, cannot be relied upon as a defense in this action.

The second question is as to whether the claim under assessment was a provable debt at the time of adjudication. While it may be that a creditor might have leave to prove a debt accruing after adjudication, under the circumstances in this case, as ascertained from the pleadings and an examination of the cases, I am satisfied that the question involved is whether the amount due on the assessment was or was not a provable claim at the time of adjudication.

I am unable to agree with the decided cases holding that a stockholder in a national bank becomes a surety as to his liability for assessment to pay the creditors of an insolvent institution. See *McClaine v. Rankin*, 197 U. S. 154. The court in that case on page 161 said:

> "Some statutes imposing individual liability are merely in affirmation of the common law, while others impose an individual liability other than that at common law. If section 5151 had provided that subscribing to stock or taking shares of stock amounted to a promise directly to every creditor, then that liability would have been a liability by contract. But the words of section 5151 do not mean that the stockholder promises the creditor *as surety* for the debts of the corporation, but merely impose a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. The liability is a consequence of the breach by the corporation of its contract to pay, and is collateral and statutory." (Italics mine.)

See, also, *Thomas v. Matthiessen*, 232 U. S. 221, 236.

Under the early cases it is somewhat debatable as to whether the obligation is a contract or a claim based upon a statutory liability. Under different circumstances the courts have come to different conclusions.

It is quite clear that the one in whose name stock stands on the books of the association remains liable for assessment, so long as the stock is allowed to stand in his name. See, *Matteson v. Dent*, 176 U. S. 521, 530.

The case of *McClaine v. Rankin*, 197 U. S. 154, supra, involved the statute of limitations as applied to an action instituted to recover an assessment in a national bank matter, and the court said in conclusion:

> "But here the right to sue did not obtain until the Comptroller of the Currency had acted, and his order was the basis of the suit. The statute of limitations did not commence to run until assessment made, and then it ran as against an action to enforce the statutory liability and not an action for breach of contract."

(pages 162-3.)

This decision of the Supreme Court as applied to the matters involved in the instant action has never been changed or reversed. On the contrary it has been uniformly followed to make effective the statute imposing double liability on holders of national bank stock.

See the opinion in *Christopher v. Norvell*, 201 U. S. 216, wherein the court, on pages 225 and 226, fully sustains the principle declared in the McClaine case. See, also, *Thomas v. Matthiessen*, 232 U. S. 221, supra.

The case of *Armstrong v. McAdams* (C. C. A. 8) 46 F. (2d) 931 was an action to recover on an assessment made by the Comptroller, and involved the question of the statute of limitations. The decision in the case of McClaine v. Rankin as to the action arising from a statutory liability and not out of contract express or implied, was discussed and approved.

The doctrine of the McClaine case was followed in the case of *Holman v. Clark* (E. D. Mich. N. D.) 48 F. (2d) 253. After citing from the Supreme Court case the court said on page 254:

"Section 5151 of the United States Revised Statutes to which the court there referred is now sections 63, 64 of title 12 of the United States Code (12 U. S. C. A. sections 63, 64), already hereinbefore quoted. That decision has not been overruled or modified, either expressly or by inference, and is therefore clearly binding upon this court and decisive of the question now under consideration."

In the case of *Thomas v. Commonwealth Trust Co. of Pittsburgh* (W. D. Pa.) 2 F. Supp. 654, which involved the right to recover against the committee of a lunatic, the court approved the principle stated in the McClaine case, and, on page 655, said:

"The question under immediate consideration is essentially the same as was before the Supreme Court in Christopher v. Norvell, 201 U. S. 216, 26 S. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740. In that case the stockholder was a married woman, who, under the statutes of the state of her residence, was incapable of entering into a contract. As in the present case, it was there asserted by the defendant below that the relation of the shareholder to a national bank is wholly contractual in character, and that the inability of defendant to contract freed her from liability for her share of the assessment. The court held that the liability did not arise wholly out of contract, but was collateral and statutory, and that the defendant was subject to assessment. See, also, Keyser v. Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. Ed. 531; McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500; Thomas v. Matthiessen, 232 U. S. 221, 235, 34 S. Ct. 312, 58 L. Ed. 577.

The purpose of the statute (section 64, supra) is manifest. Congress desired to protect creditors of national banks, and to strengthen such banks with the public by imposing upon them this liability of the shareholders as a safeguard. If cer-

tain stockholders are to be free from liability for reasons such as advanced in the instant case, the purpose of Congress would be seriously affected."

In the case of *Rogers v. Jarden*, 3 F. Supp. 211, which affected the question of proper pleading in the Eastern District of Pennsylvania, the court, in approving the doctrine set forth in the McClaine case, said on pages 212-3:

"The Supreme Court of the United States has recognized this form of liability as contractual in some aspects and noncontractual in others. In McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 411, 49 L. Ed. 702, 3 Ann. Cas. 500, it was held that an action to enforce the statutory liability was not 'an action upon a contract or liability, express or implied, which is not in writing . . .' within the meaning of a state statute of limitations. To the same general effect is Christopher v. Norvell, 201 U. S. 216, 26 S. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740, where the state law construed prohibited a married woman from entering into a contract which would subject her to personal liability. For the limited purpose of construing these state statutes, the stockholder's statutory liability was held noncontractual.

On the other hand, in Matteson v. Dent, in holding the liability to be a debt of the estate of a deceased stockholder, the court said: 'The obligation of a subscriber to stock to contribute to the amount of his subscription for the purpose of the payment of debts is contractual, and arises from the subscription to the stock. . . . This contract obligation, existing during life, is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder.'

The situation which produced the apparent diversity of rulings in the foregoing cases exists in the present case. The trouble is that the Legislature usually fails to recognize and provide for

quasi contractual obligations as a separate and distinct class, and, in construing the various statutes, it is necessary, therefore, to attempt to classify them as either contractual or noncontractual. In each case the governing consideration is the policy of the statute or law to be construed and what it was intended to accomplish."

The case of *Hendrickson v. Helmer* (Idaho, S. D.) 7 F. Supp. 627 was an action by a trustee in bankruptcy to set aside an alleged fraudulent conveyance made by the bankrupt to his wife four years before the assessment on his bank stock was made by the Comptroller. The court stated that under the Idaho law a transfer to a wife in good faith for the purpose of making a gift, and not to defraud existing creditors was valid, and that the validity of such fraudulent conveyance against creditors does not depend upon subsequent events.

Discussing the legal aspects as affected by the decision in the McClaine case the court said on pages 628-9:

"Whether a conveyance of property is fraudulent or not, it must appear that there were existing creditors at the time of the alleged fraudulent transfer and that the transfer was made with the intent to delay or defraud such creditors. Section 54-906, I. C. A. As has been said, the liability of the bankrupt as a stockholder was statutory and contingent, depending upon the bank's inability to pay its debts and contracts. To say that the bankrupt was a debtor of the bank by reason of his contingent liability on his stock four years before it was known and determined that the bank could not pay its debts and contracts and the assessment made by the Comptroller would be indulging in the realm of uncertainty which may never occur. If such reasoning is accepted, then a stockholder of a national bank could never in good faith convey any property while he owned

stock without it being subject to cancellation in the event that at some future time the bank became insolvent and unable to pay its creditors."

In approving the doctrine in the McClaine case the court said on page 628:

> "The liability of a shareholder in a national bank to respond to an assessment in case of insolvency as prescribed by section 64, title 12 U. S. C. A., is statutory, and, upon the failure of the bank, the rights of its creditors intervene and attach. Scott v. Deweese, 181 U. S. 202, 21 S. Ct. 585, 45 L. Ed. 822; Concord First National Bank v. Hawkins, 174 U. S. 364, 19 S. Ct. 139, 43 L. Ed. 1007; Salter v. Williams et al. (D. C.) 219 F. 1017. It is for the benefit of the bank's creditors represented by the receiver of the bank, and is conditional and contingent, and the right to sue does not obtain until the Comptroller has acted, which is the basis of the suit. McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500. The bank being insolvent and having creditors at the time it closed, the individual liability of its stockholders existed to such debts, contracts, and engagements of the bank."

There are some cases, as against estates, devisees and legatees, in which it is held that the liability arises prior to the insolvency of the bank, and prior to the assessment by the Comptroller, for the purpose of charging the estates or beneficiaries with the payment of the assessment, but these decisions do not change the basic principle adopted in the McClaine case.

As stated by Judge Kirkpatrick in the case of *Rogers v. Jarden,* 3 F. Supp. 211, supra: "In each case the governing consideration is the policy of the statute or law to be construed and what it was intended to accomplish."

I am convinced that, under the facts in the instant case, the doctrine of the McClaine case is controlling;

that the obligation of the defendant did not arise out of contract, express or implied, but was in the nature of a statutory liability, and that the debt arising therefrom became due and owing at the time the assessment was made. The liability of the shareholder, as to the debts of the national bank, is with relation to those debts owing at the time the assessment is made.

It is claimed by defendant that the Union National Bank was insolvent on September 30, 1931, when, for purposes of liquidation, it sold all of its assets to the Atlantic City National Bank, under an agreement, which, among other things, provided that the Union National Bank should, upon the expiration of the period of two years, the time fixed for liquidation, repay to Atlantic City National Bank the amounts due on unpaid notes, which were to be considered as losses. This is the liability upon which the Comptroller declared the bank insolvent and appointed a receiver and subsequently levied an assessment.

If the Union National Bank was actually insolvent on September 30, 1931, the date of the agreement, the liability of the defendant could not be fixed on that date. Many of the creditors' claims had been satisfied before the actual declaration of insolvency by the Comptroller, and it was impossible to fix the defendant's liability until after the bank had been taken over by the Comptroller.

The statute, found in 12 U. S. C. A. sec. 65, providing for the fixing of the liability by the court, as to banks in liquidation, could not advance the time of the defendant's liability, unless court proceedings had been taken thereunder.

In the case of *Scovill v. Thayer,* 105 U. S. 143, which was an action to recover an assessment on stock of a corporation, not fully paid, and involved the time of the commencement of the running of the statute of

limitations, the court, as to the time when the cause of action accrued, said, on pages 155-6:

> "The question for solution is, therefore, When, under the facts of this case, did the cause of action accrue against the defendant in error? Certainly not until it became his duty to pay according to the terms of his contract or according to law.
>
> It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. Curry v. Woodward, 53 Ala. 371; Robinson v. Bank of Darien, &c., 18 Ga. 65; Ward v. Griswoldville Manufacturing Co., 16 Conn. 593. But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear the Statute of Limitations does not begin to run in his favor until such order or demand. Van Hook v. Whitlock, 3 Paige (N. Y.), 409; Salisbury v. Black's Adm'r, 6 Har. & J. (Md.) 293; Sinkler v. The Turnpike Company, 3 Pa. 149; Walter v. Walter, 1 Whart. (Pa.) 292; Quigg v. Kittredge, 18 N. H. 137; Nimmo v. Walker, 14 La. Ann. 581.
>
> In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to

pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete."

Hawkins v. Glenn, 131 U. S. 319, was a case involving similar questions, and the court in that case said on page 332:

> "Some further observations may not inappropriately be added. Unpaid subscriptions are assets, but have frequently been treated by courts of equity as if impressed with a trust sub modo, upon the view that, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds to be accounted for as held in trust, and that therefore statutes of limitation do not commence to run in respect to them, until the retention of the money has become adverse by a refusal to pay upon due requisition.
>
> But the conclusion as to the statute need not be rested on that ground; for, although the occurrence of the necessity of resorting to unpaid stock may be said to fix the liability of the subscriber to respond, he cannot be allowed to insist that the amount required to discharge him became instantly payable though unascertained, and though there was no request, or its equivalent, for payment."

Under all of the circumstances of the instant case, I am satisfied that the ownership of the stock was in the defendant at the time of assessment; that the obligation was not a provable claim against the bankrupt estate at the time of adjudication; that the discharge of defendant as a bankrupt did not relieve him from the assessment on his stock made thereafter; and that the fact that the Union National Bank went into vol-

untary liquidation prior to defendant's adjudication as a bankrupt could not fix the liability of defendant prior to adjudication, unless proceedings had been taken prior thereto under the provisions of 12 USCA sec. 65.

The answer will be stricken as sham, the defenses "First" to "Thirteen", inclusive, will be stricken as sham or frivolous, and a rule for summary judgment will be entered for the amount of the assessment with interest and costs.

RULE STRIKING ANSWER AND FOR SUMMARY JUDGMENT.

(Filed July 23, 1935.)

IN THE UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF NEW JERSEY.

L-4392. ACTION AT LAW.

ON MOTION TO STRIKE ANSWER AND FOR SUMMARY JUDGMENT.

Edward J. O'Keefe, Receiver of the Union National Bank of Atlantic City, New Jersey, (Substituted for Laurence A. Slaughter, Former Plaintiff),
Plaintiff,

v.

William Elmer Brown, Jr.,
Defendant.

This matter coming on to be heard in the presence of William B. Hunter, of the firm of Bourgeois & Coulomb, attorneys for plaintiff, and Bolte & Tripician, attorneys for defendant, on April 13, 1935, on plaintiff's motion to strike the answer filed herein, upon the grounds that said answer is sham and frivolous and for the entry of a summary judgment; and the court having considered the arguments of counsel and being of the opinion that the defenses set up in said answer are all either sham or frivolous, and that a summary judgment should be entered herein in favor of the plaintiff and against the defendant;

IT IS, on this twentieth day of July, A. D. 1935, on motion of Bourgeois & Coulomb, attorneys for plaintiff, ORDERED, that the answer and defenses filed

herein be and the same are hereby stricken and that judgment be entered in favor of the plaintiff, Edward J. O'Keefe, receiver of the Union National Bank of Atlantic City, N. J., and against the defendant in the amount of $1000, together with interest at 6 per cent. per annum from the eighth day of January, A. D. 1934, to date, amounting to the sum of $92, making in all the sum of $1092, together with costs, to be taxed.

JOHN BOYD AVIS,
Judge.

On motion of

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

EXCEPTION.

(Filed September 4, 1935.)

An order having been entered in this cause on July 20, 1935, directing that the answer and defenses filed herein be stricken, and that judgment be entered in favor of plaintiff and against the defendant, and defendant having prayed an exception to this rule, an exception thereto is allowed accordingly.

JOHN BOYD AVIS,
District Court Judge.

Dated August 29, 1935.

We consent to the entry of the above exception.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

NOTICE OF APPEAL.

(Filed September 10, 1935.)

To Edward J. O'Keefe, Receiver of The Union National Bank of Atlantic City, N. J (Substituted for Laurence A. Slaughter), Plaintiff:

You are hereby notified that William Elmer Brown, Jr., the defendant in the above cause, appeals from the whole of the judgment, in the sum of $1092.00 and costs, rendered against him in your favor in this cause on July 20, 1935, and from the order of the Court entered herein on that date striking defendant's answer and defenses filed herein and directing that said judgment be entered, said appeal being taken to the United States Circuit Court of Appeals for the Third Circuit.

BOLTE & TRIPICIAN,
By G. ARTHUR BOLTE,
Attorneys for Defendant.

Service of the within notice of appeal is hereby acknowledged this ninth day of September, 1935.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

ASSIGNMENT OF ERRORS.

(Filed September 10, 1935.)

And now comes the defendant, by Bolte & Tripician, Esqs., his attorneys, and says that there is error in the record and judgment in this cause and assigns as error upon which he expects to rely in the appellate court the following:

1. The Court erred in striking defendant's answer and defenses filed herein.

2. The Court erred in entering final judgment in favor of the plaintiff.

3. The Court erred in striking the second defense of defendant's answer.

4. The Court erred in striking the third defense of defendant's answer.

5. The Court erred in striking the fourth defense of defendant's answer.

6. The Court erred in striking the fifth defense of defendant's answer.

7. The Court erred in striking the sixth defense of defendant's answer.

8. The Court erred in striking the seventh defense of defendant's answer.

9. The Court erred in striking the eighth defense of defendant's answer.

10. The Court erred in striking the ninth defense of defendant's answer.

11. The Court erred in striking the tenth defense of defendant's answer.

12. The Court erred in striking the eleventh defense of defendant's answer.

13. The Court erred in striking the twelfth defense of defendant's answer.

14. The Court erred in striking the thirteenth defense of defendant's answer.

15. The Court erred in holding that defendant's liability or obligation to pay assessment for the recovery of which this suit was instituted was not a provable claim against the bankrupt estate of this defendant at the time of defendant's adjudication.

16. The Court erred in holding that the fact that the Union National Bank went into voluntary liquidation prior to defendant's adjudication as a bankrupt could not fix the liability of defendant prior to adjudication, unless proceedings had been taken prior thereto under the provisions of 12 U. S. C. A. Sec. 65.

17. The Court erred in holding or ruling that the obligation of defendant to pay assessment upon the stock which he owned in said Union National Bank did not arise out of contract, express or implied.

18. The Court erred in holding or ruling that the debt arising from defendant's stock assessment liability was not a provable debt discharged by defendant's bankruptcy because it did not become due and owing until the assessment was made thereon.

19. The Court erred in holding or ruling in effect that in order for defendant's stock assessment liability to be discharged by reason of defendant's adjudication

in bankruptcy, it was necessary that the debt arising therefrom should be due and owing at the time of said adjudication.

20. The Court erred in holding or ruling that it was impossible to fix the defendant's liability to stock assessment until after the Union National Bank had been taken over by the Comptroller of the Treasury.

21. The Court erred in ruling or holding that "The Statute, found in 12 U. S. C. A. Sec. 65, providing for the fixing of liability by the Court, as to banks in liquidation, could not advance the time of the defendant's liability, unless court proceedings had been taken thereunder."

22. The Court erred in holding or ruling in effect that the defendant's liability to stock assessment did not become a provable debt, dischargeable by bankruptcy, until or unless defendant's liability to stock assessment had been determined either by Court action or proceedings under 12 U. S. C. A. Sec. 65, or by assessment made by the Comptroller of the Treasury, prior to the time of defendant's adjudication, notwithstanding the fact that Union National Bank was then in the process of voluntary liquidation, and insolvent.

23. The Court erred in entering summary judgment in favor of plaintiff and against the defendant and by so doing denying to defendant a trial of the facts alleged in the several defenses set up in defendant's answer.

Wherefore the said defendant, William Elmer Brown, Jr., prays that the said errors be corrected and the judgment of the District Court reversed.

BOLTE & TRIPICIAN,
Attorneys for Defendant.

PETITION OF APPEAL.

(Filed September 10, 1935.)

To the Honorable Judges of the United States District Court for the District of New Jersey:

The petition of William Elmer Brown, Jr., defendant herein, respectfully represents:

That petitioner is aggrieved by the judgment and order herein rendered on July 20, 1935, in favor of plaintiff, Edward J. O'Keefe, receiver of the Union National Bank of Atlantic City, N. J. (substituted for Laurence A. Slaughter, former plaintiff), and against the said defendant for the sum of $1092, together with all costs of suit, and that petitioner, for the reasons specified in the assignment of errors filed herewith, desires to appeal from said decree and desires that said appeal returnable to the Circuit Court of Appeals for the Third Circuit shall operate as a supersedeas and may suspend during the pendency of said appeal the effect of said judgment and order.

Whereupon, petitioner prays that said appeal may be allowed, and that upon his giving bond in an amount to be fixed and approved by this Court the said appeal may operate as a supersedeas and may suspend during the pendency of said appeal the execution and collection of said judgment. Petitioner further prays that said appeal be made returnable to the United States Circuit Court of Appeals for the Third Circuit, according to law, and that a transcript of the records, proceedings, papers and exhibits upon which said order was rendered, duly authenticated, be sent to said Circuit Court of Appeals, and petitioner prays for all general and equitable relief.

BOLTE & TRIPICIAN,
Attorneys for Defendant.

ORDER ALLOWING APPEAL.

(Filed September 10, 1935.)

On motion of Messrs. Bolte & Tripician, attorneys for the defendant herein, and upon filing a petition for an order allowing an appeal and assignments of error,

It is ordered that the petition be and the same is hereby granted and said defendant is hereby allowed to make an appeal to the United States Circuit Court of Appeals, for the Third Circuit, to have reviewed in the United States Circuit Court of Appeals, for the Third Circuit, the judgment and order heretofore entered and filed herein on July 20, 1935, and that the amount of bond on appeal be and hereby is fixed in the sum of twenty-five hundred dollars ($2500), which bond may be executed by the defendant, as principal, and by such surety or sureties as shall be approved by this court, and which shall operate as a supersedeas bond and stay of execution is hereby granted pending the determination of such appeal.

Dated this tenth day of September, 1935.

JOHN BOYD AVIS,
District Court Judge.

BOND.

(Filed September 10, 1935.)

KNOW ALL MEN BY THESE PRESENTS, that we, William Elmer Brown, Jr., of the City of Ventnor City, Atlantic County, New Jersey, as Principal, and Sallie A. Brown, of the City of Atlantic City, same County and State, are held and firmly bound unto Edward J. O'Keefe, Receiver of the Union National Bank of At-

lantic City, N. J., (substituted for Laurence A. Slaughter, former plaintiff), the Plaintiff in the above-entitled action, in the penal sum of Twenty-five Hundred Dollars ($2500.00), lawful money of the United States of America, for the payment of which well and truly to be made, the said principal and said surety do hereby bind themselves, their heirs, administrators, executors and assigns, as the case may be, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Atlantic City, N. J., the ninth day of September, A. D. 1935.

The condition of this undertaking is such that:

WHEREAS, the above-named defendant has appealed, or is about to appeal, to the United States Circuit Court of Appeals for the Third Circuit, from the judgment entered in favor of Plaintiff and against Defendant, in the above-entitled court in the above-entitled action on or about the twentieth day of July, 1935.

NOW, THEREFORE, in consideration of said appeal and of the premises, if the appellant, William Elmer Brown, Jr., defendant above named, shall prosecute his appeal to effect and answer all damages and costs if he fails to make his plea good, then this obligation shall be void, otherwise to remain in full effect, force and virtue.

WILLIAM ELMER BROWN, JR., (L. S.)
Principal.

SALLIE A. BROWN, (L. S.)
Surety.

STATE OF NEW JERSEY,
ATLANTIC COUNTY, } *ss.:*

I, SALLIE A. BROWN, surety on the within bond, being first duly sworn upon oath deposes and says: That I am a resident and freeholder of said county and am worth at least $2500.00 over and above all debts and liabilities by me owing and all property exempt by law from levy or sale upon execution.

SALLIE A. BROWN.

Sworn and subscribed to before me this ninth day of September, 1935.

EDNA C. HELLER,
Notary Public of New Jersey.
My commission expires January 12, 1936.

The within and foregoing bond is approved both as to sufficiency and form and is allowed as a supersedeas on this tenth day of September, 1935.

JOHN BOYD AVIS,
Judge of the United States District Court for the District of New Jersey.

[fol. 70] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Appellant,

vs.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Appellee

And afterwards, to wit, the 5th day of November, 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 24th day of January, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 71] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Defendant-Appellant,

v.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Plaintiff-Appellee

Appeal from the District Court of the United States for the District of New Jersey

OPINION—Filed January 24, 1936

Before Buffington, Davis and Thompson, Circuit Judges

BUFFINGTON, J.:

In this case it appears that Brown, the appellant owned ten shares of the stock of the Union National Bank of At-

lantic City, N. J. On April 21, 1933, he filed a petition in bankruptcy, listed such stock as an asset and noted its statutory liability to assessment. After adjudication, his trustee took no steps to decline to accept such stock. Thereafter the court granted Brown's discharge. Following this the bank failed. The Comptroller assessed Brown and, on his refusal to pay such assessment, the receiver brought this [fol. 72] suit against him. On the pleadings, the court below filed an opinion, holding the liability of Brown was not a provable debt in bankruptcy and that "under all the circumstances of the instant case, I am satisfied that the ownership of the stock was in the defendant at the time of the assessment".

Assuming for present purposes that the court was right in its holding that the liability to assessment was not a provable debt, the question remains was the court right in holding that the ownership of the stock was in Brown at the time of the assessment? Now Brown was not liable to assessment unless he was the "real owner" of the stock at the time of assessment, for such is the test laid down in 280 U. S. 496, where it is said: "That the actual owner of the stock may be held for the assessment although his name does not appear upon the transfer books of the bank, is well settled."

Moreover, the fact is that on Brown's bankruptcy the ownership of this stock, by act of law, passed to his creditors and was vested in his trustee. Brown could not sell, control, assert or exercise any act of ownership over it. No doubt, the trustee could, by leave of court, have declined to accept the stock and surrendered it to Brown. But he neither did so nor applied to the court for leave so to do. It follows, therefore, that Brown, having by force of law been deprived of all interest in, or ownership of, the stock and ownership never having revested in him, the court was in error in holding he was the owner when the stock was assessed. Its judgment is, therefore, reversed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 73] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Appellant,

vs.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Appellee

On Appeal from the District Court of the United States, for the District of New Jersey

This cause came on to heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs.

Philadelphia, January 24, 1936.

Per Curiam, Buffington, Circuit Judge.

Endorsements: Order Reversing Judgment, Received & Filed Jan. 24, 1936. Wm. P. Rowland, Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

No. 5941.

WILLIAM ELMER BROWN, JR.,

Defendant-Appellant,

v.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J.,

Plaintiff-Appellee.

Petition for Rehearing.

Appeal From the District Court of the United States For the District of New Jersey.

WILLIAM B. HUNTER,
BOURGEOIS & COULOMB,
Counsel for Plaintiff-Appellee-Petitioner.

International, 236 Chestnut St., Philadelphia

IN THE

United States Circuit Court of Appeals,

FOR THE THIRD CIRCUIT.

No. 5941.

WILLIAM ELMER BROWN, JR.,
Defendant-Appellant,

v.

EDWARD J. O'KEEFE, RECEIVER OF THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.,
Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

PETITION FOR REHEARING.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now on this day comes EDWARD J. O'KEEFE, RECEIVER OF THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J., plaintiff-appellee in the above case, and files this, his petition for a rehearing, and for grounds thereof alleges the following:

1. In the findings contained in the opinion filed herein on January 24, 1936, as follows:

> "Moreover, the fact is that on Brown's bankruptcy the ownership of this stock, by act of law, passed to his creditors and was vested in his trus-

> tee. Brown could not sell, control, assert or exercise any act of ownership over it. *No doubt, the trustee could, by leave of court, have declined to accept the stock and surrendered it to Brown. But he neither did so nor applied to the court for leave so to do.* It follows, therefore, that Brown, having by force of law been deprived of all interest in, or ownership of, the stock and ownership never having revested in him, the court was in error in holding he was the owner when the stock was assessed. Its judgment is, therefore, reversed." (Italics ours.)

this court misapprehended, misconceived and overlooked the evidence in the case for that on the argument of the motion for a summary judgment before the United States District Court for the District of New Jersey, (a) it was proved and admitted that Clarence E. Knauer, Esq., the Trustee in Bankruptcy of the appellant, William Elmer Brown, Jr., received into his possession, as said Trustee, the ten shares of the capital stock of the Union National Bank, upon which said assessment was subsequently levied, which said stock was then registered in the name of the said appellant, William Elmer Brown, Jr.; that after investigation, said Trustee concluded there was no equity in said ten shares of bank stock, and that said stock would be burdensome to the bankrupt estate which he was administering; that accordingly said Trustee prepared a petition addressed to the Referee in Bankruptcy praying authority to abandon all title to and disclaim all interest of the bankrupt in said ten shares of stock; that pursuant to the prayer of said petition, the said Referee did, by order bearing date of the twenty-seventh day of October, 1933, direct said Trustee to abandon all title to and disclaim all interest of said bankrupt in said ten shares of stock. (All of which appeared in the affidavit of the said Clarence E. Knauer, Trustee in Bankruptcy of the appellant, Wil-

liam Elmer Brown, Jr., appearing on page 31 of the record on appeal filed in this cause), and (b) it was further proved and admitted that pursuant to the prayer of the said petition of the said Trustee in Bankruptcy, the said Referee in Bankruptcy, by order bearing date of the twenty-seventh day of October, 1933, did order and direct as follows:

> "Clarence E. Knauer, Trustee of the above-named bankrupt, having filed his petition, requesting leave to abandon certain property of the bankrupt, on the ground that there is no equity in the said property for the unsecured creditors and the same is therefore burdensome to the bankrupt estate, and it appearing that the prayer of the petition should be granted;
>
> It is, therefore, on this twenty-seventh day of October, A. D. 1933, Ordered that the said Clarence E. Knauer, Trustee of the said William Elmer Brown, Jr., bankrupt, be and he is hereby authorized and directed to abandon all title to and to disclaim all the interest of the bankrupt in the following:
>
> Ten shares of Union National Bank stock.
>
> ROBERT E. STEEDLE,
> *Referee in Bankruptcy.*"

Said order appears on page 32 of the record on appeal filed in this cause.

2. The said affidavit and order heretofore referred to in paragraph 1 of this petition were annexed to plaintiff-appellee's motion to strike the answer filed by the defendant-appellant and for the entry of a summary judgment, because the defendant-appellant had set up as the "first Defense" in the answer filed by him the following (Record on Appeal, pages 6 and 7):

> "On April 21, 1933, defendant was adjudicated a bankrupt by the United States District Court for

the District of New Jersey and all right, title and interest of the defendant in and to the said ten shares of stock by act of law was immediately transferred to and vested in the trustee duly appointed for said defendant bankrupt, whereupon the defendant lost all dominion and control over the said shares of stock.

Said trustee has not disclaimed title to the said ten shares of stock to defendant.

At the date of the assessment levied as aforesaid defendant in law and in fact was not the legal or equitable owner of said ten shares of the stock of said Union National Bank of Atlantic City, N. J., upon which said assessment was levied."

Upon the argument of plaintiff-appellee's motion for a summary judgment before the United States District Court for the District of New Jersey, defendant-appellant specifically consented to the striking of said first defense, and the said United States District Court for the District of New Jersey based its findings in accordance with the statement of the defendant-appellant that said first defense was stricken, as appears from the memorandum of the Honorable John Boyd Avis, District Court Judge, in this cause, in which he said (Record on Appeal, page 48):

"The first defense states that defendant was adjudicated a bankrupt on April 21, 1933, and that by reason thereof from that time on he was not the legal or equitable owner of said shares of stock, and consequently is not liable for the assessment. It is not necessary to discuss this defense as defendant in his brief consents that it be stricken."

3. In the brief filed by the defendant-appellant in this court, he said, at page 2:

"We are not concerned here with the first defense because by consent that has been stricken."

In the brief filed on behalf of the plaintiff-appellee, it was stated, at page 3:

> "Defendant consented to the striking of the first defense, so it is of no moment on this appeal."

4. It was, therefore, conclusively proved and admitted that the Trustee in Bankruptcy of the defendant-appellant did, in fact, decline to accept the bank stock upon which said assessment was subsequently levied and that said Trustee had, in fact, by leave of Court, surrendered said bank stock to the said defendant-appellant, William Elmer Brown, Jr. It follows, therefore, that the said defendant-appellant, William Elmer Brown, Jr., was not deprived of all interest in or ownership of said bank stock, but as a matter of fact, the said defendant-appellant, William Elmer Brown, Jr., was the owner of said bank stock prior to and at the time on which the assessment thereon was levied by the Comptroller of the Currency of the United States of America, and is, therefore, liable in law for the payment of said assessment. All of which is contrary to the findings of this Honorable Court on this appeal.

Petitioner, therefore, humbly prays of this Honorable Court that a rehearing of said cause be allowed.

Respectfully submitted,

BOURGEOIS & COULOMB,
Counsel for Plaintiff-Appellee-Petitioner.

Dated January 30, 1936.

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

WILLIAM B. HUNTER, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am associated with the firm of Bourgeois & Coulomb, counsel for plaintiff-appellee in the above-entitled cause, and am the person actually entrusted with the management and conduct of said cause.

2. I hereby certify that in my opinion, as counsel herein, the grounds of the foregoing petition are well founded and I believe the foregoing petition for a rehearing in said cause to be well founded in law and that the same is proper to be presented and filed.

WILLIAM B. HUNTER.

Sworn and subscribed to before me this thirtieth day of January, 1936.

MADELINE M. NEWELL,
(Seal) *Notary Public of New Jersey.*

Service of a copy of the within petition for rehearing is acknowledged this thirtieth day of January, 1936.

BOLTE & TRIPICIAN,
Counsel for Defendant-Appellant.

[fol. 75] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Defendant-Appellant,

v.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Plaintiff-Appellee

SUR PETITION FOR REHEARING

And Now, to wit, March 18, 1936, after due consideration, the petition for rehearing in the above-entitled case is hereby granted and argument restricted to the question whether when the trustee disclaimed title to the bank stock which the law vested in him, he can re-confer title in the bankrupt without some affirmative action on the latter's part.

Philadelphia, March 18, 1936.

Per Curiam, Buffington, Circuit Judge.

Endorsements: Order Granting Petition for Rehearing, etc., Received & Filed March 18, 1936. William P. Rowland, Clerk.

[fol. 76] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Appellant,

vs.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Appellee

And afterwards, to wit, the 9th day of April, 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for reargument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Cir-

cuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 24th day of September, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 77] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Defendant-Appellant,

v.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Plaintiff-Appellee

Appeal from the District Court of the United States for the District of New Jersey

OPINION ON REHEARING—Filed September 24, 1936

Before Buffington, Davis and Thompson, Circuit Judges

BUFFINGTON, J.:

In the court below the receiver of a national bank brought suit against defendant to recover a hundred per cent assessment made by the Comptroller on stock of such bank standing in defendant's name on the books of the bank. The first defense of defendant was that he was not the owner of the stock for reasons stated, viz:

[fol. 78] "1. On April 21, 1933, defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey and all right, title and interest of the defendant in and to the said ten shares of stock by act of law was immediately transferred to and vested in the trustee duly appointed for said defendant bankrupt, whereupon the defendant lost all dominion and control over the said shares of stock.

2. Said trustee has not disclaimed title to the said ten shares of stock to defendant.

3. At the date of the assessment levied as aforesaid defendant in law and in fact was not the legal or equitable

owner of said ten shares of the stock of said Union National Bank of Atlantic City, N. J., upon which said assessment was levied.

4. The title to said stock was transferred to and vested in the said trustee by act of law more than sixty days prior to the appointment of the said receiver."

His other defense was that he was relieved of liability by his discharge in bankruptcy.

The case went to trial before the Judge below on the pleadings. Whereupon, as the Judge states in his opinion,

"In the complaint it is alleged that defendant at the time the assessment was levied owned ten shares of the capital stock of the bank, of a par value of $100 per share. The assessment, made on January 8, 1934, was 100 per cent. The defendant's alleged liability is $1000. The answer admits all of the material allegations of the complaint, but sets up thirteen separate defenses as a bar to the action. The first defense states that defendant was adjudicated a bankrupt on April 21, 1933, and that by reason thereof from that time on he was not the legal or equitable owner of said shares of stock, and consequently is not liable for the assessment. It is not necessary to discuss this defense as defendant in his brief consents that it be stricken."

[fol. 79] Defendant's further defense was that his discharge in bankruptcy was a bar and defense to the suit. It further appeared the trustee in bankruptcy had declined to accept the stock. Thereupon the Judge in an exhaustive and, to us, satisfactory opinion held that the statutory liability of the defendant to future assessment was not a provable claim and consequently was not discharged. In that respect the court said:

"I am convinced that, under the facts in the instant case, the doctrine of the McClaine case is controlling; that the obligation of the defendant did not arise out of contract, express or implied, but was in the nature of a statutory liability, and that the debt arising therefrom became due and owing at the time the assessment was made. * * *

Under all of the circumstances of the instant case, I am satisfied that the ownership of the stock was in the defendant at the time of assessment; that the obligation was not a provable claim against the bankrupt estate at the time of

adjudication; that the discharge of defendant as a bankrupt did not relieve him from the assessment on his stock made thereafter."

So holding, the judgment below is affirmed and the opinion filed January 24, 1936 is withdrawn from the files and this opinion substituted therefor.

A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 80] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Defendant-Appellant,

vs.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Plaintiff-Appellee

On Appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, September 24, 1936.

Per Curiam, Buffington, Circuit Judge.

Endorsements: Order Affirming Judgment, Received & Filed Sept. 24, 1936. Wm. P. Rowland, Clerk.

[fol. 81] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify

the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of William Elmer Brown, Jr., Defendant-Appellant, vs. Edward J. O'Keefe, Receiver of the Union National Bank of Atlantic City, N. J., Appellee, No. 5941, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 5th day of October, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the United States the one hundred and sixty-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 82] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 18, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

DEC 18

Supreme Court of the United States

OCTOBER TERM, 1936

No. 575

WILLIAM ELMER BROWN, JR.,

Petitioner,

vs.

EDWARD J. O'KEEFE, Receiver of THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WM. ELMER BROWN, JR.,

Counsel pro se.

I. F. Huntzinger Co., *Appellate Printers*, Camden, N. J.

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Supreme Court of the United States

OCTOBER TERM, 1936

No.

WILLIAM ELMER BROWN, JR.,
Petitioner,

vs.

EDWARD J. O'KEEFE, Receiver of THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, William Elmer Brown, Jr., respectfully files and submits this as his petition for a writ of certiorari to review a decision and judgment of the United States Circuit Court of Appeals for the Third Circuit.

On January 24, 1936, said Circuit Court of Appeals reversed a decision and judgment of the District Court of the United States for the District of New Jersey in favor of respondent herein and against petitioner for damages alleged to be owing by reason of a national bank stock assessment (R. 70 to 72, incl.).

Petition for a rehearing was later filed (R. 75 to 80, incl.) and rehearing was granted on March 18, 1936, with argument restricted (R. 81).

Said Circuit Court of Appeals on September 24, 1936, after rehearing, affirmed said decision and judgment of said District Court (R. 82 to 85, incl.).

QUESTIONS PRESENTED.

1. Whether the liability of a stockholder of a national bank to assessment for the payment of the debts of the bank is a provable debt dischargeable in bankruptcy prior to the time when an assessment is actually levied thereon by the Comptroller of the Currency. So far this question has not been decided by this or any other Court prior to the determination in the instant case.

2. Whether the liability of a stockholder for the payment of the "contracts, debts and engagements" of a national bank (Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273; 12 U. S. C. A. §64) in the process of liquidation and closed to business under sections 5220 and 5221 of the National Banking Act (R. S. §5220 and 5221, Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A. §181 and 182) is a "debt," as defined in section 1, subdivision 11, of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §1, 30 Stat. 544; 11 U. S. C. A., sec. 1, subd. 11), provable within the purview of sections 63a and 63b (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. §103a and 103b) and dischargeable as provided for in section 35 (Act of Cong., July 1, 1898, c. 541, §17, 30 Stat. 550; 11 U. S. C. A. §35) though no assessment has been made on said stock by the Comptroller of the Currency (Act of Cong., June 30, 1876, c. 156, §1, 19 Stat. 63; R. S. 5151, Dec. 23,

1913, c. 6, §23, 38 Stat. 273), or by order of court (Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63; 12 U. S. C. A. §65) before the filing of the petition in bankruptcy and particularly when said bank is insolvent.

3. Whether the liability of a stockholder of a national bank for assessment for the payment of the debts of a bank is a "contract, express or implied," within the purview of section 63-a-4 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §35, 30 Stat. 555; 11 U. S. C. A. §63).

4. Whether the liability of a stockholder of a national bank for the payment of the debts thereof becomes fixed at the time of the acquisition of said stock or at the time the assessment thereon is levied and that particularly with reference to a bank in voluntary liquidation under sections 5220 and 5221 of the National Banking Act (R. S. §5220 and 5221; Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A. §181 and 182).

5. If the liability of a stockholder of a national bank for assessment for the payment of the debts of the bank is a "contract, express or implied" but not "absolutely owing" at the time of the filing of a petition in bankruptcy, whether it is such a debt as is dischargeable within the purpose, intention and purview of sections 63a and 63b of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. 103).

6. If a stockholder in a national bank files a petition in bankruptcy listing his stock as an asset so that it thereby is transferred by operation of law to the trustee in bankruptcy more than 60 days in advance of an assessment made thereon to pay the debts of the bank and thereafter said trustee applies for and secures leave of the bank-

ruptcy court "to abandon all title to and disclaim all interest of the bankrupt" therein but does nothing more, whether that act amounts to an abandonment by said trustee within the purview of the law and the cases respecting disclaimer and abandonment of burdensome property so that the title to said stock reverts to the bankrupt with its attendant obligation for assessment without some act on the part of the bankrupt indicating his reassertion of title thereto.

STATUTES INVOLVED.

Section 35 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §17, 30 Stat. 550; 11 U. S. C. A. §35) provides that "a discharge in bankruptcy shall release a bankrupt from all his provable debts" except such as are particularly scheduled therein. This case is not within said exceptions.

Section 1, subdivision 11 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §1, 30 Stat. 544; 11 U. S. C. A. §1) defines "debt" to mean "any debt, demand, or claim provable in bankruptcy."

Section 63-a-4 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. §103-a-4) provides that "debts of the bankrupt may be proved and allowed against his estate which are • • • (4) founded upon • • • a contract express or implied."

Section 63-b of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. §103-b) provides that "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."

By Act of Congress passed December 23, 1913, (c. 6, §23, 38 Stat. 273; 12 U. S. C. A. §64) stockholders of national banks are "held individually responsible for all contracts, debts and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock." Further, by said Act it is provided that stockholders "who shall have transferred their shares • • • within sixty days • • • before • • • the failure of such association to meet its obligations, or with knowledge of such impending failure" shall be liable as though the transfer had not been made.

The National Banking Act (R. S. §5220; Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A. §181) provides that "any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

Section 2 of the Act authorizing the appointment of receivers of national banks (Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63; 12 U. S. C. A. §65) provides that "when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes • • • the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill" etc.

The first six lines of section 5151 of the Revised Statutes (12 U. S. C. A. §63) respecting the individual liability of shareholders of national banks were repealed by Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273 (12 U. S. C. A. §64). The latter section omitted the words "equally and ratably."

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Receiver of the Union National Bank of Atlantic City, N. J., instituted suit in the United States District Court for the District of New Jersey to recover assessment made by the Comptroller of the Currency of the United States upon the capital stock of said bank alleged to be owned by petitioner (R. 3 to 5, incl.).

Petitioner filed answer thereto denying ownership of the stock of said bank and charged that petitioner's liability to assessment was a provable debt or claim fixed or capable of liquidation at the time of petitioner's adjudication and discharge in bankruptcy and so, therefore, was discharged because (a) said liability was as a surety; (b) said liability was a debt or liability founded on implied contract; (c) said liability had occurred at the time of and prior to petitioner's discharge; (d) said Union National Bank became insolvent, closed its doors and went into voluntary liquidation before petitioner's bankruptcy; and (e) said liability was capable of being enforced at the time of petitioner's bankruptcy (R. 6 to 18, incl.).

The plaintiff moved to strike petitioner's answer and enter summary judgment alleging the answer was sham and the defenses were frivolous (R. 19 to 24, incl.). Supporting affidavits were filed (R. 25 to 31, incl.).

Petitioner herein filed an answering affidavit on said motion (R. 33 to 42, incl.) whereby it was proven that said Union National Bank was insolvent on September 30, 1931, and, therefore, unable to continue its business; that on that date it entered into agreement with the Atlantic City National Bank (a copy of which was attached to said affidavit, R. 38) providing for its liquidation; that on said date said

Union National Bank discontinued its business and delivered all its assets to said Atlantic City National Bank in pursuance of said agreement; that said Union National Bank was placed in voluntary liquidation in accordance with Sections 5220 and 5221 of the United States Revised Statutes, the same to take effect December 15, 1931; that at the time of the discontinuance of business by said Union National Bank petitioner was the owner of stock thereof; that on January 30, 1933, said Atlantic City National Bank, liquidating agent of said Union National Bank as aforesaid, was declared insolvent by the Comptroller of the Currency of the United States and placed in the hands of Laurence A. Slaughter, as Receiver, who, as receiver of said Union National Bank, is the plaintiff in this suit; that petitioner herein was adjudicated a bankrupt on April 21, 1933, and was discharged of all debts and claims on July 31, 1933; that the stock of said Union National Bank referred to in the complaint filed in this suit was included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank was included in the list of creditors filed therein; that petitioner herein also listed in said schedules his liability for assessment on said bank stock; that said Atlantic City National Bank, liquidating agent of said Union National Bank, and its receiver were included in the list of creditors filed in said bankruptcy proceedings; that on December 13, 1933, said Union National Bank was declared insolvent by said Comptroller of the Currency and said Slaughter was duly appointed receiver thereof; that at the time of petitioner's adjudication as a bankrupt as aforesaid it had been determined that said Union National Bank was insolvent; that ever since September 30, 1931, it had continuously been closed to business and that its assets were insufficient in value to liquidate at a sum equal to the value placed upon them by said agree-

ment of September 30, 1931; and that at the time of petitioner's adjudication as a bankrupt it had also been definitely determined and known that an assessment and requisition upon the shareholders of said Union National Bank to the total par value of the amount of stock outstanding would be necessary to pay the debts and claims of said bank. Also it was disclosed in said affidavit that the insolvency and necessity for assessment on the stock of said Union National Bank was well known to said Slaughter, the plaintiff herein, at the time of petitioner's adjudication as a bankrupt and for a long time prior to his appointment as receiver of said Union National Bank (R. 38, par. 20).

Plaintiff herein filed supplemental affidavit to be considered on said motion for summary judgment (R. 43 to 46, incl.) but nowhere therein was it denied that said Union National Bank was insolvent from a time prior to petitioner's adjudication as a bankrupt. In fact said Slaughter, plaintiff herein, in his said affidavit admits that, before his appointment as receiver of said Union National Bank, he knew of the insolvency of said bank and that an assessment would be made upon the stockholders thereof (R. 45, line 23).

In spite of the uncontradicted facts then appearing as aforesaid the United States District Court for the District of New Jersey struck out the answer filed and it was then determined and held that the obligation of petitioner, as the owner of said stock, did not arise out of contract, express or implied, but was in the nature of a statutory liability and that said obligation was not a provable debt or claim at the time of appellant's adjudication and did not become so until the Comptroller made the assessment thereon (R. 47 to 59, inc). Summary judgment was accordingly entered on July 20, 1935, against petitioner herein (R. 60).

By order duly made on April 24, 1935, Edward J. O'Keefe, Receiver of said Union National Bank appointed to succeed said Laurence A. Slaughter resigned, was substituted as party plaintiff in said suit (R. 46).

An appeal from said judgment was taken by petitioner herein to the Circuit Court of Appeals for the Third Circuit (R. 62 to 67, incl.). On January 24, 1936, said Circuit Court of Appeals filed its opinion reversing said judgment and holding that petitioner herein, having by force of law been deprived of all interest in, or ownership of, the stock, by reason of his adjudication in bankruptcy and the vesting of title thereto in his trustee, and ownership never having revested in petitioner herein, it was error to hold that petitioner was the owner when the stock was assessed (R. 70 and 71).

On January 24, 1936, an order was accordingly entered in said Circuit Court of Appeals reversing said judgment (R. 72).

Plaintiff (respondent herein) thereafter filed petition with said Circuit Court of Appeals for rehearing alleging that in the findings of that court the evidence in the case had been misapprehended, misconceived and overlooked (R. 75). In said petition for rehearing it was pointed out that the trustee in bankruptcy for petitioner herein had addressed a petition to the Referee in Bankruptcy praying authority to abandon all title to and disclaim all interest of the bankrupt in said stock and that by order of said Referee said petition was granted.

On March 18, 1936, said petition for rehearing was granted and "argument restricted to the question whether when the trustee disclaimed title to the bank stock which the law vested in him, he can reconfer title in the bankrupt without some affirmative action on the latter's part" (R. 81).

On September 24, 1936, said Circuit Court of Appeals filed its opinion on rehearing by which it found that said trustee had declined to accept the stock so that the ownership of said stock reverted to the bankrupt, the petitioner herein, and that the statutory liability of petitioner to assessment was not a provable claim for the reason that assessment had not been made thereon at the time of petitioner's adjudication as a bankrupt and so, consequently, was not discharged. Further, said Circuit Court of Appeals withdrew its opinion filed January 24, 1936, and substituted its opinion on rehearing therefor (R. 82 to 84, incl.). Accordingly on September 24, 1936, an order was entered affirming said judgment (R. 84).

On the rehearing of said appeal the appellee contended that it was conceded below that the petitioner herein was the owner of the stock at the time the assessment was levied. There was no admission whereby it could be so contended. The third paragraph of the complaint filed in this case alleged that the petitioner herein was "the owner of ten (10) shares of the capital stock of the Union National Bank of Atlantic City, N. J." (R. 4). By the third paragraph of the answer filed that allegation was denied (R. 7). The allegations of the "First Defense" (R. 6) set up in said answer, which it is alleged this petitioner consented to strike, were superfluous. Any consent to strike said "First Defense" did not dispose of the denial of ownership contained in the third paragraph of the answer.

RULINGS OF THE COURT BELOW.

The Circuit Court of Appeals adopted the opinion of the District Court as its opinion and said (R. 83) "the Judge in an exhaustive and, to us, satisfactory opinion held" etc.

The District Court, in its opinion filed in this case said

(R. 50), "While it may be that a creditor might have leave to prove a debt accruing after adjudication, under the circumstances in this case • • • I am satisfied that the question involved is whether the amount due on the assessment was or was not a provable claim at the time of adjudication." Further that court said (R. 50), "Under the early cases it is somewhat debatable as to whether the obligation is a contract or a claim based upon a statutory liability." It was held (R. 51) "quite clear that the one in whose name stock stands on the books of the association remains liable for assessment, so long as the stock is allowed to stand in his name." Said District Court recognized (R. 55) that "there are some cases, as against estates, devisees and legatees, in which it is held that the liability arises prior to the insolvency of the bank, and prior to the assessment by the Comptroller, for the purpose of charging the estates or beneficiaries with the payment of the assessment, but these decisions do not change the basic principle adopted in the McClain case." The District Court conceived the basic principle of the McClain case to be (R. 51) that the liability to stock assessment was a statutory liability, not a contract express or implied, and that the debt arising therefrom did not arise until the Comptroller had acted. The Court held (R. 56) that "if the Union National Bank was actually insolvent on September 30, 1931," the date when it went into involuntary liquidation, "the liability of the defendant could not be fixed on that date • • • and it was impossible to fix the defendant's liability until after the bank had been taken over by the Comptroller." Said District Court finally concluded (R. 56) "that the obligation of the defendant did not arise out of contract, express or implied, but was in the nature of a statutory liability, and that the debt arising therefrom became due and owing at the time the assessment was made. The liability of the shareholder, as to the debts of the national bank, is with relation to those debts owing

at the time the assessment is made" and further said (R. 58) "under the circumstances of the instant case, I am satisfied that the ownership of the stock was in the defendant at the time of assessment; that the obligation was not a provable claim against the bankrupt estate at the time of adjudication; that the discharge of defendant as a bankrupt did not relieve him from the assessment on his stock made thereafter; and that the fact that the Union National Bank went into voluntary liquidation prior to defendant's adjudication as a bankrupt could not fix the liability of defendant prior to adjudication, unless proceedings had been taken prior thereto under the provisions of 12 U. S. C. A. 65." Summary judgment was accordingly entered.

The Circuit Court of Appeals by its first opinion filed January 24, 1936 (R. 71), held:

> "Assuming for present purposes that the court was right in its holding that the liability to assessment was not a provable debt, the question remains was the court right in holding that the ownership of the stock was in Brown at the time of the assessment? Now Brown was not liable to assessment unless he was the 'real owner' of the stock at the time of assessment, for such is the test laid down in 280 U. S. 496, where it is said: 'That the actual owner of the stock may be held for the assessment although his name does not appear upon the transfer books of the bank, is well settled.'
>
> "Moreover the fact is that on Brown's bankruptcy the ownership of this stock, by act of law, passed to his creditors and was vested in his trustee. Brown could not sell, control, assert or exercise any act of ownership over it. No doubt, the trustee could, by leave of court, have declined to accept the stock and surrendered it to Brown. But he neither did so nor applied to the court for leave so to do. It follows, therefore, that Brown, having by force of law been deprived of all interest in, or ownership of, the stock

and ownership never having reinvested in him; the court was in error in holding he was the owner when the stock was assessed. The judgment is, therefore, reversed."

After rehearing "restricted to the question whether when the trustee disclaimed title to the bank stock which the law vested in him, he can re-confer title in the bankrupt without some affirmative action on the latter's part" (R. 81), said Circuit Court of Appeals disposed of the question previously decided by it by referring to the finding of the District Court that defendant had consented to striking the first defense contained in his answer (R. 82) and then affirmed the judgment below by adopting the opinion of the District Court holding "that the statutory liability of the defendant to future assessment was not a provable claim and consequently was not discharged" (R. 83).

REASONS FOR GRANTING THE WRIT.

1. The questions in issue are of great importance in administering the bankruptcy law. A review of the questions in this court will set at rest much doubt and assure a uniform and proper application of the law respecting bankruptcy and the liability of shareholders of national banks.

2. The question involved in this case, *e. g.*, whether the liability of a stockholder of a national bank is a provable debt dischargeable in bankruptcy prior to assessment, is a question of Federal law, which has not been, but should be settled by this court.

3. The decision of the Circuit Court of Appeals holding, as it does, that the liability of a shareholder of a national bank to assessment does "not arise out of a contract, express or implied" is in conflict with and contrary to the decisions of this Court in *Richmond v. Irons*, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864, 871; *Concord First National Bank v. Hawkins*, 174 U. S. 364, 372, 43 L. Ed. 1007, 1011; *Mattson v. Dent*, 176 U. S. 521, 525, 44 L. Ed. 571, 573, 20 S. Ct. 419; *McDonald v. Thompson*, 184 U. S. 71, 22 S. Ct. 297, 46 L. Ed. 437; *Christopher v. Norvell*, 201 U. S. 216, 26 S. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740; *Broderick v. Rosner*, 294 U. S. 629, 55 S. Ct. Rep. 589, 79 L. Ed. 1100, and *Seabury v. Green*, 294 U. S. 165, 168, 79 L. Ed. 834, 837, 55 S. Ct. 373, in which this Court held that the statutory liability of the shareholder of a national bank is contractual in character.

The decision of said Circuit Court of Appeals in the foregoing respect is also in conflict with the opinions of the Circuit Courts of Appeals in the following cases: *Scott v. Latimer*, 89 Fed. 843 (C. C. A. 8th); *Deweese v. Smith*, 106 Fed. 438 (C. C. A. 8th), affirmed 187 U. S. 637; *Williams v. Travis*, 277 Fed. 134 (C. C. A. 5th); *Bromfield v. Mayer*, 29 F. (2d) 891 (C. C. A. 8th); and *Drain v. Stough*, 61 F. (2d) 668 (C. C. A. 9th), all of which cases recognize the said stock liability as contractual.

4. The decision of said Circuit Court of Appeals holding, as it does, that the debt arising from said stock liability did not become due and owing until the assessment thereon was made is in conflict with and contrary to the decisions of this Court in *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537, and *Terry v. Anderson*, 95 U. S. 628, 632, 24 L. Ed. 365, 366, in which it was held that the liability of the stockholders arises when the bank refuses or ceases

to redeem and is notoriously and continuously insolvent and in *Smith v. Brown*, 187 U. S. 637, 23 Sup. Ct. 845, 47 L. Ed. 344, affirming *Deweese v. Smith*, 106 Fed. 438, in which it was held that the liability of the shareholder attaches when the "contracts, debts and engagements" of the bank are entered into.

The decision of said Circuit Court of Appeals in the foregoing respect is also in conflict with the Circuit Courts of Appeals in the following cases: *Murray v. Sill*, 7 Fed. (2d) 589 (C. C. A. 9th); *Foster v. Lincoln*, 79 Fed. 170 (C. C. A. 2d), affirming 74 Fed. 382; *Carey v. Mayer*, 79 Fed. 926 (C. C. A. 2d).

5. The decision of said Circuit Court of Appeals holding that the statutory liability of petitioner herein was not a provable claim because it was not a debt due and owing at the time of petitioner's adjudication as a bankrupt is in conflict with and contrary to the decision of this Court in *Maynard v. Elliott*, 283 U. S. 273, 275, 51 S. Ct. 390, 75 L. Ed. 1028, 1030, in which it was held "settled that claims founded upon contract, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, may be proved under subdivision (a) (4) of that section although not 'absolutely owing' when the petition is filed."

The decision of said Circuit Court of Appeals in the foregoing respect is also in conflict with a former decision of that Court in *Moch v. Market St. Natl. Bank*, 107 Fed. 897 (C. C. A. 3rd), in which it was held that "the first and fourth subdivisions of section 63" of the Bankruptcy Act "are distinct provisions and are • • • independent of each other" and that the limitation of subdivision one requiring that the claim must be "absolutely owing" cannot be carried down and read into subdivision 4.

6. The decision of said Circuit Court of Appeals holding that the liability of petitioner herein to assessment as a shareholder of a national bank was not discharged by his discharge in bankruptcy is in conflict with and contrary to the decisions of this Court in *Maynard v. Elliott,* 283 U. S. 273, 75 L. Ed. 1028, in which it was held that in the light of the purpose of the Bankruptcy Act "a meaning cannot be attributed to the plain words of subdivision (a) (4) which would restrict them as to preclude proof of claim upon the liability of an endorser of commercial paper and result in its survival of the bankrupt's discharge as an obligation enforceable against him" and in *Wolf v. Stix,* 99 U. S. 1, 7 and 8, 25 L. Ed. 309, 315, in which it was held that the debt arising under a replevin bond "payable upon the happening of an event which might never occur" and, therefore contingent, said bond being in full force when the petition in bankruptcy was filed, the sum to be paid being certain in amount, was provable in bankruptcy.

7. The decision of the Circuit Court of Appeals holding that petitioner herein, after his adjudication as a bankrupt and as a result of his trustee's alleged disclaimer and abandonment of said stock, became the owner thereof, without any affirmative act on his part, and was reinvested with the liability to assessment thereon, is in conflict with and contrary to the decisions of this Court in *First National Bank of Jacksboro v. Lasater,* 196 U. S. 118, in which it was held that if a trustee in bankruptcy declines to take title to property of the bankrupt, "the bankrupt can assert title thereto."

The decision of the Circuit Court of Appeals in the foregoing respect is also in conflict with and contrary to the decision of the Circuit Court of Appeals for the Second

Circuit *In re Wattley*, 62 Fed. (2d) 828, 829 (C. C. A. 2d), and to the decision of the Circuit Court of Appeals for the Fourth Circuit *In re Webb*, 54 Fed. (2d) 1065, 1067 (C. C. A. 4th), in which cases it was held that when property is abandoned by a trustee in bankruptcy, "the bankrupt may reassert whatever title he had before bankruptcy."

PRAYER FOR WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify, and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 5941, October Term, 1935, William Elmer Brown, Jr., Appellant, v. Edward J. O'Keefe, Receiver of the Union National Bank of Atlantic City, N. J., Appellee"; and that said judgment of the said United States Circuit Court of Appeals for the Third Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

WM. ELMER BROWN, JR.,
Petitioner and Counsel pro se.

Supreme Court of the United States

OCTOBER TERM, 1936

No.

WILLIAM ELMER BROWN, JR.,
Petitioner,

v.

EDWARD J. O'KEEFE, Receiver of THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURT BELOW.

The opinion of the District Court was written by District Judge John Boyd Avis and filed July 19, 1935. It is reported in 16 F. Supp. 494, and appears on page 47 of the Record. The two opinions of the Circuit Court of Appeals (Circuit Judges Buffington, Davis and Thompson, Judge Buffington writing) were filed January 24, 1936, and September 24,

1936. The first of said opinions is not reported but appears on page 70 of the Record. The latter opinion is reported in 85 Fed. (2d) 885, and appears on page 82 of the Record.

II.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (28 U. S. C. A. §347). The judgment of the Circuit Court of Appeals was entered September 24, 1936 (R. 84).

III.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the foregoing petition. It should be borne in mind that, approximately six months after petitioner's discharge in bankruptcy, an assessment was levied against him as the last owner of record of certain stock in the Union National Bank, insolvent. Said bank had discontinued business about 18 months before petitioner herein filed his petition in bankruptcy, having transferred all its assets to another national bank under an agreement whereby the latter undertook to, and did, satisfy all of the transferor's liabilities and the former agreed to make good any loss thereby suffered. After petitioner's adjudication, an assessment was made because of a deficiency in the assets of the bank. In this suit by the receiver of said bank to recover the assessment, petitioner set up his discharge in bankruptcy as a bar.

Reference will hereafter be made herein to the District Court opinion. This is made necessary because that opinion was adopted and accepted by the Circuit Court of Appeals as satisfactory basis and reasoning for its affirmance. It said (R. 83) "the Judge in an exhaustive and to us, satisfactory opinion, held that the statutory liability of the defendant to future assessment was not a provable claim and consequently was not discharged."

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that petitioner's liability to assessment was a statutory liability, not a "contract, express or implied."

2. The Circuit Court of Appeals erred in holding that petitioner's liability to assessment was not a provable debt or claim against petitioner's bankrupt estate.

3. The Circuit Court of Appeals erred in holding that the discharge of petitioner in bankruptcy did not relieve him from the assessment made on said bank stock.

4. The Circuit Court of Appeals erred in holding that petitioner was the owner of said bank stock at the time the assessment thereon was made.

V.

ARGUMENT.

Point A.

The liability of a stockholder of a national bank to assessment for the payment of the debts of the bank is a "contract, express or implied" within the purview of Section 63-a-4 of the Bankruptcy Act.

The Court below based its judgment in this case partly upon the finding that "the obligation of the defendant did not arise out of contract, express or implied, but was in the nature of a statutory liability" (R. 83). In so holding the Court pointed to the opinion of the Supreme Court in *McClaine v. Rankin,* 197 U. S. 154, 49 L. Ed. 702, as authority. In this respect petitioner contends the Court below fell into error.

In numerous cases decided in this and other Federal Courts it has been held that the liability of stockholders of national banks is contractual.

In *Concord First Nat'l Bank v. Hawkins,* 174 U. S. 364, 372, 43 L. Ed. 1007, 1011, it was said:

> "Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

In *Mattson v. Dent,* 176 U. S. 521, 525, 44 L. Ed. 571, 573, a widely quoted authority, the Court said:

> "The obligation of a subscriber to stock * * * is contractual and arises from the subscription to the stock. * * * the obligation to respond is engendered by and relates to the contract from which it arises."

In relying upon *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, the Court below, in the instant case, pointed out that it was there said (at page 161) that the liability was "collateral and statutory." But in that case this Court conceded "that a statutory liability may be contractual in its nature, or more accurately, quasi-contractual" (at page 159). A thorough reading of the opinion in the McClaine case does not warrant the conclusion that the Court regarded the stockholder's liability as statutory except under the peculiar circumstances of that particular case. In that case the Court was called upon to consider the effect of the Washington statute of limitations as applied to a suit brought to recover a stockholder's assessment. It is no authority for saying that the stockholder's liability is not dischargeable in bankruptcy as a "contract, express or implied."

The Court below in the instant case also said that the case of *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, "fully sustains the principle declared in the McClaine case" (R. 51). While it is true that the McClaine case is cited in *Christopher v. Norvell*, it is there held that the stockholder's liability to assessment did not arise "wholly out of contract" but that it was "contractual in its nature."

In every case in which the stockholder's liability has been said to be "statutory" the question whether said liability was dischargeable in bankruptcy was not under consideration. In those cases the construction of State statutes was before the Courts as was pointed out in *Rogers v. Jarden*, 3 Fed. Supp. 211 (D. C., E. D. Pa.).

No case has been found in which it has even been suggested that the stockholder's liability is not dischargeable because not comprehended among those debts classified in Section 63-a of the Bankruptcy Act (Act of Cong., July 1, 1898, C. 541, §63, 30 Stat. 562, 11 U. S. C. A. §103). On the contrary, those cases in which said liability has been held dischargeable have classified it under subdivision 4 of that section referring to debts "founded • • • upon a contract express or implied." A stockholder's liability to assessment being dischargeable in bankruptcy it can only be as a "contract." The fact that such liability is dischargeable is, therefore, contradictory of the finding of the Court below in the instant case that said liability "did not arise out of contract, express or implied, but was in the nature of a statutory liability." (R. 56 and R. 83).

Point B.

The liability of a stockholder for the payment of the "contracts, debts, and engagements" of an insolvent national bank in the process of liquidation and closed to business is a "debt" provable within the purview of Sections 63-a and 63-b of the Bankruptcy Act and, therefore, is dischargeable though no assessment has been made on said stock before the filing of the petition in bankruptcy.

In the recent case of *Local Loan Co. v. Hunt*, 292 U. S. 234, 243, 78 L. Ed. 1230, 1235, this Court held that an adjudication in bankruptcy releases a debtor from all previously incurred debts and it cannot be supposed that the Act intended to keep such debts alive for the purpose of permitting the creation of an enforceable lien upon a subject not existent when the bankruptcy became effective

or even arising from, or connected with, pre-existing property but brought into being solely as the fruit of the subsequent labor of the bankrupt.

Section 63-a-4 of the Bankruptcy Act (Act of Cong., July 1, 1898, C. 541, §63, 30 Stat. 562, 11 U. S. C. A. §103), provides that

> "debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded on * * * a contract express or implied."

In *Williams v. U. S. F. & G. Co.*, 236 U. S. 549, 556, 59 L. Ed. 713, 717, it was said:

> "Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy, were fixed in amount or susceptible of liquidation."

1.

The stockholder's liability to assessment is comparable to that of a surety or guarantor.

The Court below in its opinion (R. 50) says:

> "I am unable to agree with the decided cases holding that a stockholder in a national bank becomes a surety as to his liability for assessment to pay the creditors of an insolvent institution."

In the case of *Coombs v. Getz*, 285 U. S. 434, 76 L. Ed. 866, this Court was called upon to construe a provision of the California Constitution very similar to the statute prescribing the liability of stockholders in national banks. In that case it was said (at page 448) the obligation was "a contractual liability in the nature of a suretyship."

It was held in the case of *In re Rouse*, 1 A. B. R. 293 (D. C., N. D. Ohio, E. D.), that:

> (at p. 399) "The undertaking of a stockholder when he takes stock may be likened to that of a surety or guarantor — he undertakes to pay his pro rata within certain limits in case the corporation fails to do so. • • • (at p. 402) It is • • • a collateral security for the benefit of creditors as declared by our Supreme Court and as such is not a penalty for misbehavior, but rather a contract of suretyship for corporate debts."

In *King v. Pomeroy*, 121 Fed. 287 (C. C. A. 8th) the Court spoke of the stockholders as "the guarantors of its" (the corporation's) "obligations" and said that the stockholder's liability "was the pledge of a trust fund for the benefit of creditors."

2.

Claims founded upon contract are provable though not due and owing when the petition in bankruptcy is filed.

In the court below respondent urged that the petitioner's liability "was not fixed and absolutely owing at the time defendant filed his petition and his liability, if any, was at that time purely contingent." The Court below apparently agreed with this view and said (R. 35), "I am convinced that • • • the debt arising therefrom became due and owing at the time the assessment was made. The liability of the shareholder, as to the debts of the national bank, is with relation to those debts owing at the time the assessment is made." This is, in effect, saying that the debt is not dischargeable unless due and owing at the time of the bankrupt's adjudication and discharge. In this respect the Court below fell into error.

The "debt" (stockholder's assessment), being founded on contract implied by force of Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273; R. S. §5151; 12 U. S. C. A., §63, need not be due and owing to be the subject of a discharge in bankruptcy. That was the decision of this Court in the case of *Maynard v. Elliott*, 283 U. S. 273, 275, 75 L. Ed. 1028, 1030. Mr. Justice Stone, speaking for the Court, said:

> "Although the omission of any reference to contingent claims in Sec. 63 of the present act has led to some confusion and uncertainty in the decisions, *it is now settled that claims founded upon contract*, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, *may be proved under subdivision* (*a*) (4) *of that section, although not absolutely owing when the petition is filed.*"

3.

Assuming, but not admitting, that the liability of petitioner in this case was contingent at the time of the filing of his bankruptcy petition it, nevertheless, was provable. From the mere fact that some contingent claims are deemed not provable it does not necessarily follow that no contingent claims are provable. In *Maynard v. Elliott*, 283 U. S. 273, 75 L. Ed. 1028, it was held that where the amount is certain and the contingency is within the control of the creditor so far as its certainty of accrual and its susceptibility of liquidation are concerned, the debt was discharged, although the creditor had done nothing at the time of the bankruptcy to satisfy the liability. In the instant case the amount was certain for petitioner's liability was fixed and limited to the extent of the par value of his stock. It was within the power and the contingency,

if any, was within the control of the respondent so far as its certainty of accrual and its susceptibility of liquidation were concerned. Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A., Sec. 103-b, and Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63; 12 U. S. C. A., §65.

In Collier on Bankruptcy, Thirteenth Edition, Vol. 2, at page 1421, it is said:

> "The test as to whether a claim is really contingent or simply one unliquidated by legal proceedings is this: Have all the facts necessary to be proved to fasten liability already occurred? If so the claim is not contingent."

In the instant case all the facts necessary to be proved to fix the stockholder's liability had occurred and were known to this plaintiff, who was receiver for the Atlantic City National Bank, the principal creditor of the defunct Union National Bank, and such was the status of affairs at the time this petitioner filed his petition in bankruptcy.

In *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309, Mr. Chief Justice Waite, in discussing the question of the liability arising under a replevin bond in an attachment proceeding to answer the judgment of the Court for the value of the goods replevied, and whether such liability constituted a contingent debt provable in bankruptcy under the Act of 1867, said at pages 7 and 8, 99 U. S., and page 313, 25 L. Ed.:

> "The debt thus created was provable under the bankruptcy act. It was payable upon the happening of an event which might never occur, and was, therefore, contingent. The bond was in full force when the petition in bankruptcy was filed. The sum to be paid was certain in amount. Whether the event will ever occur, the amount to be paid was fixed."

4.

Petitioner's liability to assessment was fixed and certain.

During the consideration of this whole matter it is essential that we have in mind the financial status of the Union National Bank on September 30, 1931 (the date when it went into voluntary liquidation), and thereafter. Defendant's answer, which was stricken by the Court below, charges the insolvency of the bank and supports that charge by affidavit filed. No contradiction of that fact was made by respondent, and, of course, in view of the fact that the decision below was on motion to strike the answer, the allegations of the answer are taken as admitted. The fact of insolvency being certain, petitioner's stock was subject to assessment to meet the deficiency between assets and liabilities to the limit of the par value thereof.

It is apparent that Congress recognized the liability to assessment as fixed because in the statute providing for that liability it is provided (Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273; 12 U. S. C. A., Sec. 64), that the stockholder cannot escape his liability by a transfer of his stock made less than 60 days prior to the date of the failure of the bank to meet its obligations or with knowledge of such impending failure.

In *Terry v. Tubman*, 92 U. S. 156, 165, Mr. Justice Hunt, speaking for the Court, said:

> "the liability of the stockholders arises when the bank refuses or ceases to redeem and is notoriously and continuously insolvent."

The case last cited above was referred to with approval by the Supreme Court in *Terry v. Anderson*, 95 U. S. 628.

In *Carey v. Mayer*, 79 Fed. 926, 929 (C. C. A. 2nd), the Court said:

> "when the fact of insolvency has been confessed, and an assignment for the benefit of its creditors has been made, nothing remains to be done, in order to make the liability a fixed debt, but to ascertain the amount of the assessment by the intervention either of the corporation or of a court of chancery."

There are many cases which seem to refute the findings of the Court below that petitioner's liability as a stockholder of the Union National Bank did not become fixed, and, therefore, provable until the Comptroller's assessment was made thereon. The insolvency and voluntary liquidation of the Union National Bank preceded the Comptroller's assessment by more than two years.

Whether or not a debt is provable is not to be determined by the method of enforcement of it. It was said *In re Southern Steel Co.*, 183 Fed. 498 (D. C., N. D. Ala., S. D.):

> "the remedy by which a liability is enforced is not determinative of its provability as a debt in bankruptcy. The nature of the liability is rather the test."

The District Court here held that petitioner's obligation was not a provable debt because it was impossible to fix liability until after the bank had been taken over by the said Comptroller (R. 56). It relied upon *Scovill v. Thayer*, 105 U. S. 143 (R. 56), and *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184 (R. 58). The Circuit Court of Appeals adopted this view (R. 83). The cases cited by the Court below involved the recovery of an assessment due on account of a subscription to stock, not fully paid for, and the question of the time when the statute of limitations commenced to run against such action. Said cases had no reference to an

assessment made by the Comptroller under the authority of the National Banking Act.

Also in the case of *Harrigan, Trustee, &c., v. Bergdoll*, 270 U. S. 560, 70 L. Ed. 733, it was held that by the law of Pennsylvania, liability of shareholders of a business corporation to pay unpaid stock subscriptions for defrayal of the corporation debts becomes fixed so that the statute of limitations begins to run as soon as it is definitely ascertained that a company is insolvent and will be obliged to call unpaid stock subscriptions in order to satisfy its obligations. Also in this case the Court distinguished *Scovill v. Thayer, supra.*

In *Glenn v. Dorsheimer*, 23 Fed. 695 (C. C., E. D. Mo.), it was held that where an insolvent corporation ceases to do business, and assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, the liability of its stockholders at once becomes absolute, and the statute of limitations begins to run in their favor, and against such creditors and trustees, immediately. The Court in that case distinguished *Scovill v. Thayer, supra.*

In reliance upon the great weight of authority, it is respectfully submitted that petitioner's liability as a stockholder of the Union National Bank became fixed and susceptible of liquidation at least at the time of the occurrence of insolvency of that bank which was before the time of the filing of petitioner's petition in bankruptcy.

5.

Petitioner's liability to assessment was capable of liquidation and enforcement.

Section 2 of the Act of Cong., June 30, 1876, c. 156, 19 Stat. 63 (12, U. S. C. A., §65), reads as follows:

> *"When any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes,"* (Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A., §181) *"the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes"* (Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273; 12 U. S. C. A. §63) *"may be enforced by any creditor of such association,* by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

In the case of *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, a proceeding by a creditor to fix the stockholders' liability under the authority of foregoing section of the National Banking Act was approved.

In the case of *Hightower v. American Nat. Bank of Macon*, 263 U. S. 351, 68 L. Ed. 334, affirming (C. C. A., Ga., 1921), 276 F. 371, the facts were quite analogous to the instant case. In that case an agreement under which one national bank took over the assets of another for the purpose of liquidation and assumed the latter's liabilities was held to constitute a loan with the assets pledged as security, and not a purchase of the assets by the bank receiving them, and consequently, it was a creditor, entitled to enforce the liability of the shareholders of the liquidating bank, under Sections 5151, 5220 and 5221 of said National Banking Act. It was also held in that case that the claim of the second bank for money advanced in excess of the assets was not created during the liquidation but was a debt arising under the contract.

In *George v. Wallace*, 135 Fed. 286 (C. C. A. 8th), it was held that where a national bank assumes the debts of an insolvent bank contemplating liquidation, in consideration of a transfer of certain of the bank's available assets, and certain notes for the balance, such notes represented the "contracts, debts, and engagements" of the insolvent bank in equity, for which its shareholders were liable.

In *Schall v. Camors*, 251 U. S. 239, 64 L. Ed. 247, it was said (at p. 249, L. Ed. 252):

> "That clause b provides the procedure for liquidating claims provable under clause a if not already liquidated, especially those founded upon an open account or a contract express or implied, is entirely clear, and has been recognized repeatedly in our decisions" • • • and (at p. 251, L. Ed. 253).
>
> "Since claims founded upon an open account or upon a contract express or implied often require to be liquidated, some provision for procedure evidently was called for; clause b fulfills this function," &c.

As to the method of fixing the shareholder's liability it was said in *U. S. v. Knox*, 102 U. S. 422, 425; 26 L. Ed. 216:

> "In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain (1) the whole amount of the par value of all the stock held by all the shareholders; (2) the amount of the deficit to be paid after exhausting all the assets of the bank; (3) then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank, at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock."

6.

In considering the time when the stockholder's liability becomes fixed or due and owing a distinction must be made between national banks in liquidation and those for which a receiver has been appointed.

In the opinion of the District Court (R. 56) adopted by the Circuit Court of Appeals as its opinion (R. 83), it is said that "the statute found in 12 U. S. C. A. 65, providing for the fixing of the liability by the Court, as to banks in liquidation, could not advance the time of the defendants' liability, unless court proceedings had been taken thereunder." The cases of *Scovill v. Thayer*, 105 U. S. 143, and *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184, were cited as support for that view. In this respect, it is respectfully submitted that the lower Court fell into error. In the first place, 12 U. S. C. A. 65, (Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63) does not provide for the "fixing" of the liability. That section provides that the individual liability of the shareholders "may be enforced" by any creditor. There is a decided difference between "fixing" and "enforcing" said liability. Secondly, a distinction was recognized by this Court in the case of *McDonald v. Thompson*, 184 U. S. 71, 46 L. Ed. 437, between actions brought by creditors under Section 5220 of the National Banking Act (providing for voluntary liquidation) and those brought by a receiver under Section 5234 (authorizing the Comptroller to step in, in the event of insolvency) to recover stockholder's assessment and in this connection Mr. Justice Brown, speaking for the Court, said (at p. 76, L. Ed. 440):

> "But it is also sufficient to say of this that the action is not brought by the creditors under the second section of the Act of June 30, 1876, but by the receiver under Rev. Sta. Sec. 5234. In such cases no debt becomes

due to the receiver as such until a deficiency has been ascertained and an assessment made, when the statute begins to run. Scovill v. Thayer, 105 U. S. 145; Hawkins v. Glenn, 131 U. S. 319."

Point C.

When a trustee disclaims title to burdensome property vested in him by operation of law, he cannot re-confer title in the bankrupt together with its attendant burdens or obligations without some affirmative action on the latter's part.

By the adjudication in bankruptcy and the appointment of the trustee, the bankrupt in this case was divested of all title to his property, and that title vested in the trustee as of the date of filing the petition in bankruptcy. Certainly there can be no doubt that such is the law.

It is likewise the law that the trustee may abandon any of the property of the bankrupt that he deems burdensome and worthless for the purposes of the bankrupt estate. It was argued below that the title to such abandoned property remains in or reverts to the bankrupt upon the exercise of the trustee's right of abandonment, and from this it is asserted in effect, that the obligations which attached to the abandoned property likewise remain in or revert to the bankrupt and are not discharged in the bankruptcy proceedings.

It is true that the courts have on many occasions said that the title to abandoned property revests in the bankrupt. However, there is no justification for the assertion that an abandonment of the property amounts to a reinstatement of the obligations affixed thereto.

As to encumbered property abandoned by the trustee, the Court *In re Webb*, 54 Federal (2d) 1065, 1067 (C. C. A. 4th), said that "The property and the right of redemption remains in or reverts to the bankrupt." There is, however, no law that has come to our attention by which it can be said that the bankrupt by reason of the abandonment is compelled to assert his right or title thereto. While there seems to be no direct statement of law on that specific question, there is nevertheless, an answer to be found by inference in statements made in several of the cases. In *First National Bank of Jacksboro v. Lasater*, 196 U. S. 115, 49 L. Ed. 408, in which the Court, speaking of trustees in bankruptcy, said (at p. 119, L. Ed. 409), "If they decline to take the property, the bankrupt *can assert* title thereto." This statement of this Court seems to indicate that it is for the bankrupt to elect to assert or claim the title to the abandoned property.

In re Wattley, 62 Fed. (2d) 828, 829 (C. C. A. 2d), the Court said:

> "When property is abandoned, the bankrupt *may reassert* whatever title he had before bankruptcy."

In the case of *In re Webb*, 54 Fed. (2d) 1065, 1067 (C. C. A. 4th), the Court, in speaking of the title to abandoned property said, "The bankrupt *has a right to assert* his title thereto."

In all of the above cited authorities, it is certainly apparent that the Court regarded as necessary some overt act on the part of the bankrupt before he could be said to have accepted the return of the title of the property so abandoned. No Court has yet said that after having been adjudicated a bankrupt and the bankrupt having been discharged from the burden of the obligations attached to his property, that same burdensome and onerous property

which in all probability compelled his bankruptcy, can be thrown back upon him with all its burdens by the mere act of abandonment by the trustee.

The trustee is the representative of the creditors. In fact, he is chosen by them. His status and duties are fully outlined in the case of *Imperial Assurance Company v. Livingstone,* 49 Fed. (2d) 745 (C. C. A. 8th). His abandonment and rejection of burdensome and onerous property is the abandonment and rejection of the creditors which he represents. If the creditors disapprove of the abandonment, they have the right to register objection by appropriate court action. If they do not register their objection, they thereby approve, in effect, what the trustee has done. Certainly the creditors, acting through the trustee, cannot by rejection and abandonment of property throw back the title thereto to an unwilling bankrupt, together with all its attendant obligation from which the bankrupt sought discharge. If such is the law, then the real purpose of the Bankruptcy Act cannot be accomplished. Then, too, if such could be done it would enable the creditor to withdraw or exclude his claim from the effect of a discharge. Certainly it cannot be said that personal property which is subject to the lien of a chattel mortgage can be abandoned by the trustee because it is burdensome and onerous and thus cast back upon the shoulders of the bankrupt the obligation to pay the chattel mortgage debt. Neither can the trustee abandon a real property asset subject to mortgage and so throw back upon the bankrupt the title thereto, together with all the mortgage obligation, unless the bankrupt should choose to accept it. Property which is the subject of judgment lien might be abandoned by the trustee, but certainly by so doing it cannot be said that the title reverts to the bankrupt and with it the obligation to pay the judgment.

If such is the law, the policy of the Bankruptcy Act to discharge the bankrupt from his debts and liabilities and enable him to take a fresh start would, in most cases, never be accomplished. It is respectfully submitted that ownership as distinguished from title to property can only be said to exist where the owner exercises some rights pertaining thereto.

There is no proof in this case which warrants the conclusion that petitioner was the legal owner of the stock in question at the time the assessment was made. On the application to strike the answer, the plaintiff, respondent herein, submitted an affidavit which appears on page 25 of the Transcript of Record. There is no proof in that affidavit that the defendant was the owner of the stock in question. There is merely a statement of the particulars of the suit upon which the plaintiff hoped to succeed. If, however, the statement in that affidavit can be taken to be a proof of title or ownership, the affidavit which was filed on behalf of the defendant, petitioner herein (R. 33), presents facts which refute the allegations of ownership as a matter of law.

VI.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its judicial discretion and of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined, and that the judgment of the District Court and of the United States Circuit Court of Appeals for the Third Circuit should be reversed in order that justice may be done to petitioner;

and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Third Circuit and finally reverse it.

WM. ELMER BROWN, JR.,
Counsel pro se.

FEB 13 19
CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1936

No. 575.

WILLIAM ELMER BROWN, JR.,
Petitioner,

vs.

EDWARD J. O'KEEFE, Receiver of THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.,
Respondent.

ON CERTIORARI.

Petitioner's Brief

WM. ELMER BROWN, JR.,
Counsel pro se.

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Supreme Court of the United States

OCTOBER TERM, 1936

No. 575.

WILLIAM ELMER BROWN, JR.,
Petitioner,

vs.

EDWARD J. O'KEEFE, Receiver of THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.,
Respondent.

ON CERTIORARI.

PETITIONER'S BRIEF.

I.

OPINIONS OF THE COURT BELOW.

The opinion of the District Court was written by District Judge John Boyd Avis and filed July 19, 1935. It is reported in 16 F. Supp. 494, and appears on page 47 of the Record. The two opinions of the Circuit Court of

Appeals (Circuit Judges Buffington, Davis and Thompson, Judge Buffington writing) were filed January 24, 1936, and September 24, 1936. The first of said opinions is not reported but appears on page 70 of the Record. The latter opinion is reported in 85 Fed. (2d) 885, and appears on page 82 of the Record.

Reference is made in this brief to the District Court opinion. This is made necessary because that opinion was adopted and accepted by the Circuit Court of Appeals as satisfactory basis and reasoning for its affirmance. It said (R. 83) "the Judge in an exhaustive and to us, satisfactory opinion, held that the statutory liability of the defendant to future assessment was not a provable claim and consequently was not discharged."

II.

STATEMENT OF THE CASE.

The Receiver of the Union National Bank of Atlantic City, N. J., instituted suit in the United States District Court for the District of New Jersey to recover assessment made by the Comptroller of the Currency of the United States upon the capital stock of said bank alleged to be owned by petitioner. (R. 3 to 5, incl.)

Petitioner filed answer thereto denying ownership of the stock (paragraph 3, R. 6), and charged that petitioner's liability to assessment was a provable debt or claim fixed or capable of liquidation at the time of petitioner's adjudication and discharge in bankruptcy and so, therefore, was discharged because (a) said liability was as a surety; (b) said liability was a debt or liability founded on implied contract; (c) said liability had occurred at the time of

and prior to petitioner's discharge; (d) said Union National Bank became insolvent, closed its doors, and went into voluntary liquidation before petitioner's bankruptcy; and (e) said liability was capable of being enforced at the time of petitioner's bankruptcy. (R. 6 to 18, incl.)

The respondent (plaintiff below) moved to strike petitioner's answer and enter summary judgment alleging the answer was sham and the defenses were frivolous. (R. 19 to 24, incl.) Supporting affidavits were filed. (R. 25 to 31, incl.) This was in pursuance of provisions of the New Jersey Practice Act which, in a proper case, permits the striking of an answer and defenses as sham or frivolous (N. J. Pamphlet Laws 1912, c. 231, p. 380), but this is only permissible where it is patent that there is no possible question of fact for the consideration of the jury. Plaintiff's averment that the defenses set up in the answer were frivolous necessarily carried with it the admission (for the purpose of the motion) of the truthfulness of the allegations of said defenses.

Petitioner herein filed an answering affidavit on said motion (R. 33 to 42, incl.), whereby it was proven that *said Union National Bank was insolvent on September 30, 1931,* and, therefore, unable to continue its business; that on that date it entered into agreement with the Atlantic City National Bank (a copy of which was attached to said affidavit, R. 38), providing for its liquidation and in pursuance thereof discontinued its business and delivered all its assets to said Atlantic City National Bank; that *said Union National Bank was placed in voluntary liquidation in accordance with Sections 5220 and 5221 of the United States Revised Statutes* (Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A. §181 and 182), *the same to take effect December 15, 1931*; that at the time of the discontinuance of business by said Union National Bank petitioner was the owner of stock thereof;

that on January 30, 1933, said Atlantic City National Bank, liquidating agent of said Union National Bank as aforesaid, was declared insolvent by the Comptroller of the Currency of the United States and placed in the hands of Laurence A. Slaughter, as Receiver, who, as Receiver of said Union National Bank, was the plaintiff in this suit; *that petitioner herein was adjudicated a bankrupt on April 21, 1933, and was discharged of all debts and claims on July 31, 1933*; that the stock of said Union National Bank referred to in the complaint filed in this suit was included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank was included in the list of creditors filed therein; that petitioner herein also listed in said schedules his liability for assessment on said bank stock; that said Atlantic City National Bank, liquidating agent of said Union National Bank, and its Receiver were included in the list of creditors filed in said bankruptcy proceedings; that *on December 13, 1933, said Union National Bank was declared insolvent by said Comptroller of the Currency* and said Slaughter was duly appointed Receiver thereof; that at the time of petitioner's adjudication as a bankrupt as aforesaid it had been determined that said Union National Bank was insolvent; that ever since September 30, 1931, said bank had continuously been closed to business and that its assets were insufficient in value to liquidate at a sum equal to the value placed upon them by said agreement of September 30, 1931; and that at the time of petitioner's adjudication as a bankrupt it had also been definitely determined and known that an assessment and requisition upon the shareholders of said Union National Bank to the total par value of the amount of stock outstanding would be necessary to pay the debts and claims of said bank. Also it was disclosed in said affidavit that the insolvency and necessity for assessment

on the stock of said Union National Bank was well known to said Slaughter, the plaintiff, at the time of petitioner's adjudication as a bankrupt and for a long time prior to his appointment as Receiver of said Union National Bank. (R. 38, par. 20.)

On January 8, 1934, the Comptroller of the Currency made the assessment upon the shareholders of the Union National Bank to the extent of the full par value thereof. Said assessment is the basis for this suit.

Respondent (plaintiff below) filed supplemental affidavit to be considered on said motion for summary judgment (R. 43 to 46, incl.), but nowhere therein was it denied that said Union National Bank was insolvent from a time prior to petitioner's adjudication as a bankrupt. In fact, the Receiver of said bank, in his affidavit, admits that before his appointment as Receiver of said Union National Bank, he knew of the insolvency of said bank and that an assessment would be made upon the stockholders thereof. (R. 45, line 23.)

In spite of the uncontradicted facts then appearing as aforesaid the United States District Court for the District of New Jersey struck out the answer filed and it was then determined and held that the obligation of petitioner, as the owner of said stock, did not arise out of contract, express or implied, but was in the nature of a statutory liability and that said obligation was not a provable debt or claim at the time of petitioner's adjudication and did not become so until the Comptroller made the assessment thereon. (R. 47 to 59, incl.) Summary judgment was accordingly entered on July 20, 1935, against petitioner herein. (R. 60.)

By order duly made on April 24, 1935, Edward J. O'Keefe, Receiver of said Union National Bank, appointed to succeed said Laurence A. Slaughter resigned, was sub-

stituted as party plaintiff in said suit (R. 46) and is the respondent herein.

An appeal from said judgment was taken by petitioner herein to the Circuit Court of Appeals for the Third Circuit. (R. 62 to 67, incl.) On January 24, 1936, said Circuit Court of Appeals filed its opinion reversing said judgment and holding that petitioner herein, having by force of law been deprived of all interest in, or ownership of, the stock, by reason of his adjudication in bankruptcy and the vesting of title thereto in his trustee, and ownership never having revested in petitioner, it was error to hold that petitioner was the owner when the stock was assessed. (R. 70 and 71.)

On January 24, 1936, an order was accordingly entered in said Circuit Court of Appeals reversing said judgment. (R. 72.)

Respondent herein thereafter filed petition with said Circuit Court of Appeals for rehearing alleging that in the findings of that Court the evidence in the case had been misapprehended, misconceived and overlooked. (R. 75.) In said petition for rehearing it was pointed out that the trustee in bankruptcy for petitioner herein had addressed a petition to the Referee in Bankruptcy praying authority to abandon all title to and disclaim all interest of the bankrupt in said stock and that by order of said Referee said petition was granted.

On March 18, 1936, said petition for rehearing was granted and "argument restricted to the question whether when the trustee disclaimed title to the bank stock which the law vested in him, he can reconfer title in the bankrupt without some affirmative action on the latter's part." (R. 81.)

On September 24, 1936, said Circuit Court of Appeals filed its opinion on rehearing by which it found that said trustee had declined to accept the stock so that the owner-

ship of said stock reverted to the bankrupt, the petitioner herein, and that the statutory liability of petitioner to assessment was not a provable claim for the reason that assessment had not been made thereon at the time of petitioner's adjudication as a bankrupt and so, consequently, was not discharged. Further, said Circuit Court of Appeals withdrew its opinion filed January 24, 1936, and substituted its opinion on rehearing therefor. (R. 82 to 84, incl.) Accordingly on September 24, 1936, an order was entered affirming said judgment. (R. 84.)

On the rehearing of said appeal the respondent contended that it was conceded below that the petitioner herein was the owner of the stock at the time the assessment was levied. There was no admission whereby it could be so contended. The third paragraph of the complaint filed in this case alleged that the petitioner herein was "the owner of ten (10) shares of the capital stock of the Union National Bank of Atlantic City, N. J." (R. 4). By the third paragraph of the answer filed, that allegation was denied. (R. 7.) The allegations of the "First Defense" (R. 6) set up in said answer, which it is alleged this petitioner consented to strike, were superfluous. Any consent to strike said "First Defense" did not dispose of the denial of ownership contained in the third paragraph of the answer.

III.

RULINGS OF THE COURT BELOW.

The District Court, in its opinion filed in this case said (R. 50), "While it may be that a creditor might have leave to prove a debt accruing after adjudication, under the circumstances in this case * * * I am satisfied that the

question involved is whether the amount due on the assessment was or was not a provable claim at the time of adjudication." Further that Court said (R. 50), "Under the early cases it is somewhat debatable as to whether the obligation is a contract or a claim based upon a statutory liability." It was held (R. 51) "quite clear that the one in whose name stock stands on the books of the association remains liable for assessment, so long as the stock is allowed to stand in his name." Said District Court recognized (R. 55) that "there are some cases, as against estates, devisees and legatees, in which it is held that the liability arises prior to the insolvency of the bank, and prior to the assessment by the Comptroller, for the purpose of charging the estates or beneficiaries with the payment of the assessment, but these decisions do not change the basic principle adopted in the McClaine case." The District Court conceived the basic principle of the McClaine case to be (R. 51) that the liability to stock assessment was a statutory liability, not a contract express or implied, and that the debt arising therefrom did not arise until the Comptroller had acted. The Court held (R. 56) that "if the Union National Bank was actually insolvent on September 30, 1931," the date when it went into voluntary liquidation, "the liability of the defendant could not be fixed on that date * * * and it was impossible to fix the defendant's liability until after the bank had been taken over by the Comptroller." Said District Court finally concluded (R. 56) "that the obligation of the defendant did not arise out of contract, express or implied, but was in the nature of a statutory liability, and that the debt arising therefrom became due and owing at the time the assessment was made. The liability of the shareholder, as to the debts of the national bank, is with relation to those debts owing at the time the assessment is made" and further

said (R. 58) "under the circumstances of the instant case, I am satisfied that the ownership of the stock was in the defendant at the time of assessment; that the obligation was not a provable claim against the bankrupt estate at the time of adjudication; that the discharge of defendant as a bankrupt did not relieve him from the assessment on his stock made thereafter; and that the fact that the Union National Bank went into voluntary liquidation prior to defendant's adjudication as a bankrupt could not fix the liability of defendant prior to adjudication, unless proceedings had been taken prior thereto under the provisions of 12 U. S. C. A. 65." Summary judgment was accordingly entered.

The Circuit Court of Appeals by its first opinion filed January 24, 1936 (R. 71), held, in part, that

> "on Brown's bankruptcy the ownership of this stock, by act of law, passed to his creditors and was vested in his trustee. Brown could not sell, control, assert or exercise any act of ownership over it. * * * It follows, therefore, that Brown, having by force of law been deprived of all interest in, or ownership of, the stock and ownership never having invested in him, the Court was in error in holding he was the owner when the stock was assessed. The judgment is, therefore, reversed."

After rehearing "restricted to the question whether when the trustee disclaimed title to the bank stock which the law vested in him, he can re-confer title in the bankrupt without some affirmative action on the latter's part" (R. 81), the Circuit Court of Appeals, disregarding petitioner's denial of ownership of said stock (Paragraph 3 of Answer, R. 6), disposed of the question previously decided by it by referring to the finding of the District Court that petitioner had consented to striking the first defense contained in his answer (R. 82) and then affirmed the judgment below

by adopting the opinion of the District Court holding "that the statutory liability of the defendant to future assessment was not a provable claim and consequently was not discharged." (R. 83.)

IV.

QUESTIONS PRESENTED.

1. Whether the liability of a stockholder of a national bank to assessment for the payment of the debts of the bank is a provable debt dischargeable in bankruptcy prior to the time when an assessment is actually levied thereon by the Comptroller of the Currency. So far this question has not been decided by this Court.

2. Whether the liability of a stockholder for the payment of the "contracts, debts and engagements" of a national bank (Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273; 12 U. S. C. A. §64) which is in the process of voluntary liquidation and closed to business under sections 5220 and 5221 of the National Banking Act (Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; R. S. §5220 and 5221; 12 U. S. C. A. §181 and 182) is a "debt," as defined in section 1, subdivision 11, of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §1, 30 Stat. 544; 11 U. S. C. A. sec. 1, subd. 11), provable within the purview of sections 63a and 63b (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. §103a and 103b) and dischargeable as provided for in section 17 (Act of Cong., July 1, 1898, c. 541, §17, 30 Stat. 550; 11 U. S. C. A. §35) though no assessment has been made on said stock by the Comptroller of the Currency (Act of Cong., June 30, 1876, c. 156, §1, 19 Stat. 63; R. S. 5151, Dec. 23, 1913, c. 6, §23,

38 Stat. 273), or by order of Court (Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63; 12 U. S. C. A. §65) before the filing of the petition in bankruptcy and particularly when said bank is insolvent.

3. Whether the liability of a stockholder of a national bank for assessment for the payment of the debts of a bank is a "contract, express or implied," within the purview of section 63-a-4 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §35, 30 Stat. 555; 11 U. S. C. A. §63).

4. Whether the liability of a stockholder of a national bank for the payment of the debts thereof becomes fixed at the time of the acquisition of said stock or at the time the assessment thereon is levied and that particularly with reference to a bank in voluntary liquidation.

5. If the liability of a stockholder of a national bank for assessment for the payment of the debts of the bank is a "contract, express or implied" but not "absolutely owing" at the time of the filing of a petition in bankruptcy, whether it is such a debt as is dischargeable within the purpose, intention and purview of sections 63a and 63b of the Bankruptcy Act.

6. If a stockholder in a national bank files a petition in bankruptcy listing his stock as an asset so that it thereby is transferred by operation of law to the trustee in bankruptcy more than 60 days in advance of an assessment made thereon to pay the debts of the bank and thereafter said trustee applies for and secures leave of the bankruptcy court "to abandon all title to and disclaim all interest of the bankrupt" therein but does nothing more, whether that act amounts to an abandonment by said trustee within

the purview of the law and the cases respecting disclaimer and abandonment of burdensome property so that the title to said stock reverts to the bankrupt with its attendant obligation for assessment without some act on the part of the bankrupt indicating his reassertion of title thereto.

V.

ARGUMENT.

In the case of *Local Loan Co. v. Hunt*, 292 U. S. 234, this Court reiterated the principle that an adjudication in bankruptcy releases a debtor from all previously incurred debts and that it cannot be supposed that the Act intended to keep such debts alive for the purpose of permitting the creation of an enforceable lien upon a subject not existent when the bankruptcy became effective or even arising from, or connected with, pre-existing property but brought into being solely as the fruit of the subsequent labor of the bankrupt. Also it was pointed out (at page 245) that the relief and new opportunity intended to be given the emancipated debtor

> "would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy."

The policy of the statute thus stated is likewise recognized in *Williams v. U. S. F. & G. Co.*, 236 U. S. 249; *Central Trust Co. v. Chicago Aud.*, 240 U. S. 582; and *Maynard v. Elliott*, 283 U. S. 273.

Point A.

The liability of a stockholder of a national bank to assessment for the payment of the debts of the bank is a "contract, express or implied" within the purview of Section 63-a-4 of the Bankruptcy Act.

As stated in the opinion below in the instant case (R. 49), "the statute (11 U. S. C. A., sec. 35), provides that the discharge 'shall release the bankrupt from all of his provable debts,' except such as are particularly scheduled therein." See Act of Cong., July 1, 1898, c. 541, §17, 30 Stat. 550; 11 U. S. C. A. §35.

Also the statute defines "debt" to mean "any debt, demand, or claim provable in bankruptcy." (Act of Cong., July 1, 1898, c. 541, §1, 30 Stat. 544; 11 U. S. C. A. §1.)

Section 63-a-4 of the said Act provides that debts of the bankrupt "may be proved and allowed against his estate which are • • • (4) founded upon an open account or upon a contract expressed or implied;" (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. §103-a-4).

Petitioner herein contends that liability for assessment on stock of a national bank must fall under the fourth classification of debts and subject to discharge as enumerated in section 63-a of the Bankruptcy Act, *supra.*

In *Williams v. U. S. F. & G. Co.*, 236 U. S. 549, 556, it was said:

> "Within the intendment of the law provable *debts include all liabilities* of the bankrupt founded on contract, express or implied, which, at the time of the bankruptcy, were *fixed in amount or susceptible of liquidation.*" (Italics ours.)

The Court below based its judgment in this case partly upon the finding that "the obligation of the defendant did

not arise out of contract, express or implied, but was in the nature of a statutory liability." (R. 56 and 83.) In so holding the Court pointed to the opinion of this Court in *McClaine v. Rankin*, 197 U. S. 154, as authority (R. 55 and 83). In this respect petitioner contends the Court below misconstrued the opinion in the McClaine case.

In numerous cases, many of which are in this Court, it has been held that the liability of stockholders of national banks is contractual. Notable among these are: *Hawthorne v. Calef*, 69 U. S. 10; *Flash v. Conn*, 109 U. S. 371; *Richmond v. Irons*, 121 U. S. 27; *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364; *Mattson v. Dent*, 176 U. S. 521; *Whitman v. Oxford, &c.*, 176 U. S. 559; *McDonald v. Thompson*, 184 U. S. 71; *Christopher v. Norvell*, 201 U. S. 216; *Bernheimer v. Converse*, 206 U. S. 516; *Selig v. Hamilton*, 234 U. S. 652; *Coombs v. Getz*, 285 U. S. 434; *Broderick v. Rosner*, 294 U. S. 629; *Scott v. Latimer* (C. C. A. 8th), 89 Fed. 843; *DeWeese v. Smith* (C. C. A. 8th), 106 Fed. 438, affirmed in *Smith v. Brown*, 187 U. S. 637; *Williams v. Travis* (C. C. A. 5th), 277 Fed. 134; *Bromfield v. Mayer* (C. C. A. 8th), 29 Fed. (2d) 891; *Drain v. Stough* (C. C. A. 9th), 61 Fed. (2d) 668.

In the early case of *Hawthorne v. Calef*, 69 U. S. 10, it was held that the obligation of the stockholder was an agreement consequent upon and resulting from the acts and admissions or implied assent of the parties.

In *Concord First National Bank v. Hawkins*, 174 U. S. 364, it was said (p. 372):

> "Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But *as the ownership of the stock, in most cases arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation.*" (Italics ours.)

In *Mattson v. Dent*, 176 U. S. 521, a widely quoted authority, this Court said (p. 525):

> "the obligation of a subscriber to stock • • • is contractual and arises from the subscription to the stock. • • • the obligation to respond is engendered by and relates to the contract from which it arises."

McDonald v. Thompson, 184 U. S. 71, was a suit by a receiver to recover an assessment made by the Comptroller and it was there held (p. 73):

> "Granting there was a contract with the creditors to pay a sum equal to the value of the stock taken, in addition to the sum invested in the shares, this was *a contract created by the statute*, and obligatory upon the stockholders by reason of the statute existing at the time of their subscription; • • • In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute *and implied from the express contract of the stockholders to take and pay for shares* in the association." (Italics ours.)

Perhaps the most recent pronouncement of this Court is in the case of *Broderick v. Rosner*, 294 U. S. 629 (decided April 1, 1935), where, in an opinion by Mr. Justice Brandeis, it was said (p. 643):

> "The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation."

It is true that in this latter case the Court had under consideration the liability imposed by sec. 120 of the Banking Law of the State of New York (Consol. Laws, Chap. 2) passed pursuant to Article 8, sec. 7, of the constitution of that State, but it is sufficient to note that the enactment

in that State is, in substance and effect, identical with the Federal provision respecting stockholders' liability.

In the case of *Seabury v. Green*, 294 U. S. 165, (decided February 4, 1935), this Court recognized the stockholders' liability as contractual for in that case it was held that minor children are not subject to stockholders' assessment because of the want of capacity to contract.

In relying upon *McClaine v. Rankin*, 197 U. S. 154, the Court below, in the instant case, pointed out that it was there said (at page 161) that the liability was "collateral and statutory." But in that case this Court conceded (at page 159) "that a statutory liability may be contractual in its nature, or more accurately, quasi-contractual." It is no authority for saying that the stockholder's liability is not dischargeable in bankruptcy as a "contract, express or implied."

The Court below in the instant case also said that the case of *Christopher v. Norvell*, 201 U. S. 216, "fully sustains the principle declared in the McClaine case" (R. 51). While it is true that the McClaine case is cited in *Christopher v. Norvell*, it is there held (at p. 228) that the stockholder's liability to assessment did not arise "*wholly* out of contract" but that it was "an implied obligation, • • • contractual in its nature."

In every case in which the stockholder's liability has been said to be "statutory" the question whether said liability was dischargeable in bankruptcy was not under consideration. In those cases the construction of State statutes was before the Courts as was pointed out in *Rogers v. Jarden* (D. C., E. D. Pa.), 3 Fed. Supp. 211.

The District Court, in this case, recognized this situation and said (R. 50):

> "Under the early cases it is somewhat debatable as to whether the obligation is a contract or a claim based

upon a statutory liability. *Under different circumstances the courts have come to different conclusions.*" (Italics ours.)

No case has been found in which it has even been suggested that the stockholder's liability is not dischargeable because not comprehended among those debts classified in Section 63-a of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. §103). On the contrary, those cases in which said liability has been held dischargeable have classified it under subdivision 4 of that section referring to debts "founded • • • upon a contract express or implied." A stockholder's liability to assessment being dischargeable in bankruptcy it can only be as a "contract." The fact that such liability is dischargeable is, therefore, contradictory of the finding of the Court below in the instant case that said liability "did not arise out of contract, express or implied, but was in the nature of a statutory liability." (R. 56 and R. 83.)

Point B.

The liability of a stockholder for the payment of the "contracts, debts and engagements" of an insolvent national bank in the process of voluntary liquidation and closed to business is a "debt" provable within the purview of Sections 63-a and 63-b of the Bankruptcy Act, and therefore, is dischargeable though no assessment has been made on said stock before the filing of the petition in bankruptcy.

Any doubt whether a debt is provable, or whether it is an unliquidated demand which may be made provable, should be resolved in favor of its provability. *Maynard v.*

Elliott, 283 U. S. 273; *Local Loan Co. v. Hunt*, 292 U. S. 234.

1.

The stockholder's liability to assessment is comparable to that of a surety or guarantor.

The Court below, in its opinion (R. 50), says "I am unable to agree with the decided cases holding that a stockholder in a national bank becomes a surety as to his liability for assessment to pay the creditors of an insolvent institution."

In *Terry v. Tubman*, 92 U. S. 156, this court had before it a provision of the charter of a bank binding the individual property of its stockholders for the ultimate redemption of its bills in proportion to the number of shares held by them respectively and, as to that liability, it was said (p. 160),

> "The case is not so much like that of the guaranty of the 'collection' of a debt, where the previous proceeding against the principal debtor is implied, as *it is like a guaranty of 'payment,'* where a resort may be had at once to the guarantor without a previous proceeding against the principal." (Italics ours.)

In the case of *Coombs v. Getz*, 285 U. S. 434, 76 L. Ed. 866, this Court was called upon to construe a provision of the California Constitution very similar to the statute prescribing the liability of stockholders in national banks. In that case it was said (at page 448) the obligation was "a contractual liability in the nature of a suretyship."

In *Williams v. Travis*, (C. C. A. 5th) 277 Fed. 134, 137, it was said,

> "Under the statute the *liability of one who is a stockholder of a national bank* at the time of its failure *is*,

to the extent of the par value of his stock in addition to the amount invested therein, *the same as it would have been if, by express contract and to the same extent, he had become the bank's surety* for all its contracts, debts and engagements." (Italics ours.)

In *King v. Pomeroy,* (C. C. A. 8th) 121 Fed. 287, the Court spoke of the stockholders as "the guarantors of its" (the corporation's) "obligations" and said that the stockholder's liability "was the pledge of a trust fund for the benefit of creditors."

2.

Claims founded upon contract are provable though not due and owing when the petition in bankruptcy is filed.

In the court below respondent urged that the petitioner's liability "was not fixed and absolutely owing at the time defendant filed his petition and his liability, if any, was at that time purely contingent," and that said liability does not become "due or enforceable before the Comptroller decides that it is necessary to collect it and fixes the date for its payment." The Court below apparently agreed with this view and said (R. 35), "I am convinced that • • • the debt arising therefrom became due and owing at the time the assessment was made. The liability of the shareholder, as to the debts of the national bank, is with relation to those debts owing at the time the assessment is made." This is, in effect, saying that the debt is not dischargeable unless due and owing at the time of the bankrupt's adjudication and discharge. In this respect the Court below fell into error.

The "debt" (stockholder's assessment), being founded on implied contract, need not be due and owing to be the

subject of a discharge in bankruptcy. That was the decision of this Court in the case of *Maynard v. Elliott*, 283 U. S. 273, 275. Mr. Justice Stone, speaking for the Court, said:

> "Although the omission of any reference to contingent claims in Sec. 63 of the present act has led to some confusion and uncertainty in the decisions, *it is now settled that claims founded upon contract*, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, *may be proved under subdivision* (a) (4) *of that section, although not absolutely owing when the petition is filed.*
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> • • • • • • • • •
>
> "That section purports to be an enumeration of classes of provable claims—not an enumeration of characteristics which must inhere in every claim proved. Only by reading into subdivision (a) (4) the limitation of subdivision (a) (1) that the claim must be absolutely owing, would there be ground for rejecting a claim against a bankrupt endorser as not complying with the former.
>
> "Respondent argues that (a) (4) must be so read, since, otherwise, the limitation in (a) (1) would be practically without effect. • • • But this contention was rejected by the decision in Williams v. United States Fidelity & G. Co. • • • and is not supported, as respondent contends, by Zavelo v. Reeves.
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> "Possible doubts as to the meaning of the section should be resolved in the light of the purpose of the act 'to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' • • • If this purpose be given its appropriate weight, a meaning cannot be attributed to the plain words of subdivision (a) (4) which would so restrict them as to preclude proof of claim upon

> the liability of an endorser of commercial paper, and result in its survival of the bankrupt's discharge as an obligation enforceable against him."

This principle of law was recognized by the Circuit Court of Appeals for the Third Circuit (from which Court this appeal is taken) in the case of *Moch v. Market St. Nat. Bank*, 107 Fed. 897, where it was said (at page 898),

> "The first and fourth subdivisions of Section 63 are distinct provisions and are, we think, independent of each other. We are unable to agree to the proposition that subdivision 1 qualifies, and is to be carried down and read into, subdivision 4."

In this same connection also see—*Manhattan Properties, Inc. v. Irving Trust Co.* (C. C. A. 2d), 66 Fed. (2d) 470, affirmed 291 U. S. 320, 78 L. Ed. 824; *In re Metropolitan Chain Stores, Inc.*, (C. C. A. 2d), 66 Fed. (2d) 485; *Wright v. Irving Trust Co.*, (C. C. A. 2d), 70 Fed. (2d) 245; *In re United Cigar Stores Co.*, (C. C. A. 2d), 70 Fed. (2d) 263; *Grant Shoe Co. v. Laird Co.*, 212 U. S. 445.

There is quite a distinction between saying that the stockholder's liability is a debt or claim and saying that it is due and enforceable. The cases on which respondent relied in the court below were *Kennedy v. Gibson*, 75 U. S. 498; *McDonald v. Thompson*, 184 U. S. 71; *Rankin v. Barton*, 199 U. S. 228; *Casey v. Galli*, 94 U. S. 673; *National Bank v. Case*, 99 U. S. 628; *U. S. v. Knox*, 102 U. S. 422; *Bushnell v. Leland*, 164 U. S. 684; *McClaine v. Rankin*, 197 U. S. 154; *Forrest v. Jack*, 294 U. S. 158; *Aldrich v. Skinner*, 98 Fed. 375; and *Armstrong v. McAdams*, 46 Fed. (2d) 931. The particular question involved in all of these cases was with reference to the time when the statute of limitations commenced to run against the action to recover the stock assessment. For that purpose the several Courts

decided and agree that *the right of action* did not accrue until the assessment had been made by the Comptroller. Those cases cannot, under any stretch of the imagination, be said to be authority for the proposition that the stockholder's liability to assessment is not provable and so not dischargeable until the assessment is made by the Comptroller even in a case of involuntary liquidation. There is a distinction between "a debt" and the accrual of the right of action thereon.

In all of the following cases debts or claims against bankrupts were found to be provable and therefore discharged notwithstanding that the debts or claims were immature at the time of filing petitions. *Glenn v. Abell,* (C. C., D. S. C.) 39 Fed. 10; *In re Joel J. Gerson,* 107 Fed. 897; *Cobb v. Overman,* (C. C. A. 4th) 109 Fed. 65; *In re Frederick L. Grant Shoe Co.,* (C. C. A. 2d) 130 Fed. 881 affirming 125 Fed. 576; *In re Pettingill & Co.,* (D. C., Mass.) 137 Fed. 143; *In re Smith,* (D. C., R. I.) 146 Fed. 923; *In re James Dunlap Carpet Co.,* (D. C., Pa.) 163 Fed. 541; *In re Caloris Mfg. Co.,* (D. C., E. D. Pa.) 179 Fed. 722; *In re Glick,* (D. C., N. Y.) 184 Fed. 967; *Hardesty v. Young,* (D. C., Minn.) 34 Fed. (2d) 310; *In re William H. Morgan,* (D. C., N. J.) 39 Fed. (2d) 489; *Delong v. Mechanics & Metals Nat. Bank,* 153 N. Y. S. 1010; *City Hall B. & L. Assn. v. Star Corp.,* 110 N. J. Law 570.

It has been held in a number of cases that a claim based on a contract right, although for unliquidated damages, is provable in bankruptcy. *Crawford v. Burke,* 195 U. S. 176; *Tindle v. Birkett,* 205 U. S. 184; *Re Manhattan Ice Co.,* (D. C. N. Y.) 114 Fed. 400 affirmed as *In re Stern* (C. C. A. 2d) 116 Fed. 604; *Merchants' Natl. Bank v. Cont. B. & L. Assn.,* (C. C. A. 9th) 232 Fed. 828; *Matter of Spengler,* (D. C. Iowa) 238 Fed. 862; *Carroll Elec. Co., v. Snelling,* (C. C. A. 1st) 62 Fed. (2d) 413.

In *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 582, this Court held that a claim for damages by reason of a breach of an executory contract was provable within the meaning of Sec. 63-a-4 and that the damages might be liquidated under Sec. 63-b.

3.

Assuming, but not admitting, that the liability of petitioner in this case was contingent at the time of the filing of his bankruptcy petition it, nevertheless, was provable.

In *Manhattan Properties, Inc., v. Irving Trust Co.*, (C. C. A. 2d) 66 Fed. (2d) 470, affirmed 291 U. S. 320, it was held that a contingent claim may in general be proved. Also see *In re Metropolitan Chain Stores, Inc.*, (C. C. A. 2d) 66 Fed. (2d) 485; *Wright v. Irving Trust Co.*, (C. C. A. 2d) 70 Fed. (2d) 245; *In re United Cigar Stores Co.*, (C. C. A. 2d) 70 Fed. (2d) 263; *In re F. & W. Grand Stores, Inc.*, (C. C. A. 2d) 74 Fed. (2d) 654; *In re Paramount Publix Corp.*, (D. C., S. D. N. Y.) 8 Fed. Supp. 644; *In re Smith*, (D. C., R. I.) 146 Fed. 923; *In re James Dunlap Carpet Co.*, (D. C. Pa.) 163 Fed. 541; and *In re Pettingill & Co.*, (D. C. Mass.) 137 Fed. 143.

In *Collier on Bankruptcy*, Thirteenth Edition, Vol. 2, at page 1421, it is said:

> "The test as to whether a claim is really contingent or simply one unliquidated by legal proceedings is this: Have all the facts necessary to be proved to fasten liability already occurred? If so the claim is not contingent."

In *Maynard v. Elliott*, 283 U. S. 273, 75 L. Ed. 1028, it was held that where the amount is certain and the con-

tingency is within the control of the creditor so far as its certainty of accrual and its susceptibility of liquidation are concerned, the debt was discharged, although the creditor had done nothing at the time of the bankruptcy to satisfy the liability.

In the instant case the amount was certain for petitioner's liability was fixed and limited to the extent of the par value of his stock. It was within the power and the contingency, if any, was within the control of the respondent so far as its certainty of accrual and its susceptibility of liquidation were concerned. The Union National Bank being in the process of voluntary liquidation the stockholder's liability was enforceable by virtue of Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A., Sec. 103-b, and Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63; 12 U. S. C. A., §65. All the facts necessary to be proved to fix the stockholder's liability in this case had occurred and were known to this respondent, who was Receiver for the Atlantic City National Bank, the principal creditor of the defunct Union National Bank, and such was the status of affairs at the time this petitioner filed his petition in bankruptcy.

In *Wolf v. Stix*, 99 U. S. 1, Mr. Chief Justice Waite, in discussing the question of the liability arising under a replevin bond in an attachment proceeding to answer the judgment of the Court for the value of the goods replevied, and whether such liability constituted a contingent debt provable in bankruptcy, said (at pages 7 and 8):

> "The debt thus created was provable under the bankruptcy act. It was payable upon the happening of an event which might never occur, and was, therefore, contingent. The bond was in full force when the petition in bankruptcy was filed. The sum to be paid was certain in amount. Whether the event will ever occur, the amount to be paid was fixed."

This principle is also recognized and approved in the following cases: *Irons v. Mfgrs., etc.* (C. C., N. D. Ill.), 17 Fed. 308; *Glenn v. Dorsheimer* (C. C., E. D. Mo.), 23 Fed. 695; *Murray v. Sill* (C. C. A. 9th), 7 Fed. (2d) 589; *Hendrickson v. Helmer,* 7 Fed. Supp. 627.

It has also been held that the liability of the shareholders under Section 64 attaches when the "contracts, debts and engagements" of the bank are entered into. *Foster v. Lincoln* (C. C., D. Vt.), 74 Fed. 382, affirmed (C. C. A. 2d), 79 Fed. 170; *Witters v. Sowles* (C. C., D. Vt.), 32 Fed. 130, 137; *Young v. Wenepe* (C. C., N. D. Cal.), 46 Fed. 354; *DeWeese v. Smith* (C. C. A. 8th), 106 Fed. 438, affirmed *Smith v. Brown,* 187 U. S. 637.

In *Terry v. Tubman,* 92 U. S. 156, 165, Mr. Justice Hunt, speaking for this Court, said:

> "the liability of the stockholders arises when the bank refuses or ceases to redeem and is notoriously and continuously insolvent."

The case last cited above was referred to with approval in *Terry v. Anderson,* 95 U. S. 628.

In *Carey v. Mayer* (C. C. A. 2nd), 79 Fed. 926, 929, the Court said:

> "when the fact of insolvency has been confessed, and an assignment for the benefit of its creditors has been made, nothing remains to be done, in order to make the liability a fixed debt, but to ascertain the amount of the assessment by the intervention either of the corporation or of a court of chancery."

There are many cases which seem to refute the findings of the Court below that petitioner's liability as a stockholder of the Union National Bank did not become fixed, and, therefore, provable until the Comptroller's assessment was made thereon. The insolvency and voluntary liquida-

tion of the Union National Bank preceded the Comptroller's assessment by more than two years.

The respondent argued in the court below that it must be the law that "in cases where a national bank is in voluntary liquidation, under provisions of 12 U. S. C. A., 181" (Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112), "there must be some judicial ascertainment of the necessity for levying an assessment against the shareholders before their liability to such an assessment attaches and becomes absolute," etc. The only two sections of the National Banking Act which refer to the enforcement of the stockholders' liability are Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63, and Act of Cong., May 15, 1916, c. 121, 30 Stat. 121. The first of said Acts provides that when any national bank shall have gone into voluntary liquidation, the individual liability of the shareholders "may be enforced by any creditor of such association by bill in equity," etc., and the other provides that where a national bank has been declared insolvent by the Comptroller of the Currency, the Receiver appointed by him under the authority of that section "may, if necessary, to pay the debts of such association, enforce the liability of the stockholders," but that such action may be taken only "under the direction of the Comptroller." It can plainly be seen, therefore, why our Courts have said that the Receiver can only act after the Comptroller has determined the necessity for such action and why it has been decided that the Comptroller must determine that necessity before the Receiver proceeds to enforce the liability. It is quite clear that Congress intended that creditors should have the right to enforce the liability by creditors' bill without any prior determination of the necessity therefor. Our Courts have in a number of instances recognized this distinction between the two sections of the National Bank-

ing Act herein referred to. Some of those cases will be referred to later herein.

The District Court below, in this case, held that the obligation was not a provable debt because it was impossible to fix liability until after the bank had been taken over by the Comptroller (R. 56). It relied upon *Scovill v. Thayer*, 105 U. S. 143 (R. 56), and *Hawkins v. Glenn*, 131 U. S. 319 (R. 58). The Circuit Court of Appeals adopted this view (R. 83). The cases cited by the Court below involved the recovery of an assessment due on account of a subscription to stock, not fully paid for, and the question of the time when the statute of limitations commenced to run against such action. Said cases had no reference to an assessment made by the Comptroller under the authority of the National Banking Act.

Since the filing of the petition for certiorari in this cause there has come to the attention of petitioner the case of *Erickson v. Richardson*, decided on December 9, 1936, in the Circuit Court of Appeals for the Ninth Circuit. The opinion does not appear in the official reports. It was published in the January 22, 1937, issue of New Decisions of the Bankruptcy Law Service of Commercial Clearing House, Inc., and is designated therein as No. 4371. The opinion is here quoted in full:

> "Prior to January 21, 1935, appellee, as superintendent of banks of the State of California, took possession and charge of the assets of the Bank of San Pedro. At that time bankrupt owned 2,602 shares of the common capital stock of said bank which had a par value of $100 per share. On January 21, 1936, the bankrupt was adjudicated bankrupt. The referee allowed as a general claim against the bankrupt estate, the claim for $260,200 presented by appellee.
>
> "Appellant, the trustee in bankruptcy, contends that the claim could not be filed in the bankruptcy

proceeding because: (1) the assessment *made after the filing of the petition* was too indefinite and remote a contingency to constitute a debt at the time of the filing of the petition; and (2) if it were such a debt, it is 'founded' *entirely* upon the California statute imposing double liability, and has none of the elements which would constitute a debt 'founded • • • upon a contract express or implied,' as required by sec. 63 (a) (4) of the Bankruptcy Act. It is conceded that the liability here sought to be enforced is not within any other provision of Sec. 63.

"With regard to the first contention, it seems foreclosed by the decision in Maynard v. Elliott, 283 U. S. 273, in which the Supreme Court held that the future and contingent liability of an indorser of commercial paper, executed before but maturing after the filing of the petition in bankruptcy, is a debt on an express contract, provable in a bankruptcy proceeding. The contingencies of liability upon the assessment of the stock by the superintendent of banks are no more remote, uncertain, or unlikely, than the non-payment of commercial paper or the non-performance of a guaranteed obligation.

"With regard to the second contention, the court holds that the obligation of the stockholder to the insolvent bank to pay the moneys to discharge the bank's creditors is a debt 'founded upon a contract' as that term is used in the bankruptcy statute. The character of a stockholder's liability must be determined by the California law, and under California law it is held that such liability arises out of contract. The claim was therefore properly allowed."

Petitioner has been unable to find any case deciding that the stockholder's liability is not dischargeable in bankruptcy until after the Comptroller has levied the assessment. Assume, by way of illustration, that the Comptroller of the Currency determines that a national bank is insolvent and appoints a receiver in charge; that

one year thereafter the Comptroller levies a stock assessment; and that during the interim between the appointing of a receiver of the insolvent bank and the levying of the assessment, a stockholder of that institution is adjudged a bankrupt and discharged of his debts, among which was listed his stock liability. Can it be said that under such circumstances the stockholder is not legally discharged of that obligation? All of the elements are present to make that liability in that instance a provable debt, except, of course, that it is not due and owing, and as was said in *Maynard v. Elliott*, 283 U. S. 273, that limitation cannot be read into Section 63-a-4 of the Bankruptcy Act. The illustration stated above is analogous to the situation in the instant case. Here the Union National Bank went into liquidation in September, 1931, at which time it was insolvent. Petitioner was discharged in bankruptcy in July, 1933. The Comptroller declared the bank insolvent and appointed a Receiver in December, 1933. There was, therefore, not one single element lacking to make this petitioner's liability to assessment a provable debt. The necessity for assessment was certain and could have been definitely enforced by creditors' bill. Judicial ascertainment of the necessity was not essential to a fixing of the liability; it could only serve to determine the amount due.

In reliance upon the great weight of authority, it is respectfully submitted that the liability as a stockholder of the Union National Bank became fixed and susceptible of liquidation at least at the time of the occurrence of insolvency of that bank which was before the time of the filing of petitioner's petition in bankruptcy.

4.

Petitioner's liability to assessment was capable of liquidation and enforcement.

The Union National Bank closed for business on September 30, 1931, and transferred all its assets to The Atlantic City National Bank for liquidation. On December 15, 1931, that action was approved by the stockholders of the Union National Bank in formal meeting and it was further decided at said meeting to liquidate said Union National Bank in accordance with the provisions of Sections 5220 and 5221 of the National Banking Act. (Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A. §181 and 182.)

Section 2 of the Act of June 30, 1876, c. 156, 19 Stat. 63 (Title 12, U. S. C. A., §65), reads as follows:

> "*When any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes*" (Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A., §181), "*the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes*" (Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat., 273; 12 U. S. C. A., §64), "*may be enforced by any creditor of such association*, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

In the case of *Wyman v. Wallace*, 201 U. S. 230, a proceeding by a creditor to fix the stockholders' liability was approved.

In the case of *Hightower v. American Nat. Bank of Macon*, 263 U. S. 351, affirming (C. C. A., Ga., 1921), 276 Fed. 371, the facts were quite analogous to the instant case. In that case an agreement under which one national bank took over the assets of another for the purpose of liquidation and assumed the latter's liabilities was held to constitute a loan with the assets pledged as security, and not a purchase of the assets by the bank receiving them, and consequently, it was a creditor, entitled to enforce the liability of the shareholders of the liquidating bank, under Sections 5151, 5220 and 5221 of said National Banking Act. It was also held in that case that the claim of the second bank for money advanced in excess of the assets was not created during the liquidation but was a debt arising under the contract.

In *George v. Wallace* (C. C. A. 8th), 135 Fed. 286, it was held that where a national bank assumes the debts of an insolvent bank contemplating liquidation, in consideration of a transfer of certain of the bank's available assets, and certain notes for the balance, such notes represented the "contracts, debts, and engagements" of the insolvent bank in equity, for which its shareholders were liable.

In the case of *Irons v. Manufacturer's National Bank* (C. C., N. D. Ill.), 17 Fed. 308, the original bill was filed by a judgment creditor against the defendant bank in February, 1875. It charged that the bank had suspended payment and gone into liquidation by a vote of its stockholders; that the Comptroller of the Currency had refused to appoint a receiver; that it had equitable assets which were not subject to execution and that such assets were being misapplied by its officers. The bill asked for the appointment of a receiver to take possession of the assets and wind up the affairs of the bank. By subsequent amendment to the bill, filed October 5, 1876, it was asked that

the stockholders of the bank be charged with their stock liability as created by the National Banking Act to the extent that may be necessary within the par value limit of the stock for the purpose of paying the bank's debts. Certain of the stockholder defendants advanced their discharges in bankruptcy as a defense against the liability to pay the assessment, and in this connection the Court held that it was certainly competent, under Section 5068 of the Revised Statutes (then in force), for the receiver to have proved the claim in the bankruptcy proceedings. The Court said (at p. 314) that "two factors for estimating the extent of the stockholder's liability, and debts and assets, were as well known then as now" and that even if this was not so "the court of bankruptcy would undoubtedly have given time, and so far delayed the proceedings as to enable such an estimate to be made before closing the affairs of the bankrupt estate and ordering a final dividend." The Court also said, in this case (at p. 314), that from the time the defendants became stockholders,

> "they stood liable for the debts of the bank to the extent of the stock held by them, if it should become necessary to resort to such liability after exhausting the assets of the bank, and therefore the receiver stood in a position, at the time these bankruptcy proceedings were pending, to have proved these claims before the bankruptcy court."

This same case (*Irons v. Manufacturer's National Bank*) was again before the Court in 1886 (27 Fed. 591). At that time, after considering and discussing the effect of *Garrett v. American File Co.*, 110 U. S. 288, upon its previous decision and concluding that it did not warrant any change therein, the Court held the stockholders' liability had become fixed, the debts of the bank were a fixed quantity, the amount of stock which the shareholders

respectively owned was easily provable and the claims for individual liability could have been proven.

The opinion in the Irons case might well have been written and applied to the instant case for the procedure there outlined could have been adopted and followed here.

Section 5068 of the Revised Statutes, Title "Bankruptcy," which is quoted and applied in the Irons case, is no longer law. Section 63-b of the Bankruptcy Act takes its place. The comparative effects of these two statutory enactments are discussed at quite some length in Volume II of Collier on Bankruptcy, Thirteenth Edition, page 1418, under the title "Unliquidated Claims." Also in a note appended to page 1420 of the same volume there is a discussion of the effects of these two statutes.

Upon reading the discussions of these authorities, as well as the opinions in the cases herein cited, it will be noted that in so far as the facts of this case are concerned, there is no real distinction between the two statutes. Whereas under Section 5068 of the Revised Statutes respecting "Contingent Liabilities," a liability which had become fixed but was undetermined in amount was provable, so now under Section 63-b liabilities which have become fixed are likewise provable as to the extent of said liability.

In *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 582, it was determined that a claim for damages by reason of the breach of an executory contract might be liquidated under Section 63-b.

In *Dunbar v. Dunbar*, 190 U. S. 340, the Court said (p. 350), that the purpose of Section 63-b

> "is to permit an unliquidated claim, coming within the provisions of section 63-a, to be liquidated as the court should direct."

In *Schall v. Camors,* 251 U. S. 240, it was said (p. 249):

> "That clause b provides the procedure for liquidating claims provable under clause a if not already liquidated, especially those founded upon an open account or a contract, express or implied, is entirely clear, and has been recognized repeatedly in our decisions." • • •

(p. 251):

> "Since claims founded upon an open account or upon a contract express or implied often require to be liquidated, some provision for procedure evidently was called for; clause b fulfills this function," &c.

See also *Maynard v. Elliott,* 283 U. S. 273, and *Merchants Natl. Bank v. Cont. B. & L. Assn.* (C. C. A. 9th), 232 Fed. 828.

In the case of *In re Mertens & Co.* (C. C. A. 2d), 147 Fed. 177, the Court said:

> "We think that section 63-b must be interpreted in the light of the other sections of the law and that to construe it as meaning that no proof of unliquidated claims can be filed until the precise amount due thereon is established will, in practical operation, make the allowance of such claims impossible, for the reason that a hostile trustee or creditor can easily delay the liquidation until after the expiration of the year."

In this latter case it was held that a clear statement of claim in writing duly verified and filed was sufficient and that it might be liquidated afterwards.

As to the method of fixing the shareholder's liability it was said in *U. S. v. Knox,* 102 U. S. 422, 425:

"In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain (1) the whole amount of the par value of all the stock held by all the shareholders; (2) the amount of the deficit to be paid after exhausting all the assets of the bank; (3) then to apply, the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank, at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock."

It has been held by the Courts that the bankruptcy law calls upon the creditor to act and that he cannot preserve a right by postponing action. *Williams v. U. S. F. & G. Co.*, 236 U. S. 249; *Irons v. Mfgrs. Natl. Bank* (C. C., N. D. Ill.), 17 Fed. 308.

If it be urged that, in this case, there was no creditor with a definite and determined claim who could apply to have the petitioner's stock liability fixed then that point may be answered by reference to the case of *George v. Wallace*, 135 Fed. 286, 292 (C. C. A. 8th), affirmed *Wyman v. same*, 201 U. S. 230, and *Frenza v. same*, 201 U. S. 244, and *Poppleton v. same*, 201 U. S. 245. In that case it was held that in order to maintain a bill to determine the liability of stockholders of a bank in voluntary liquidation it was not essential that the complainant should have first reduced his demand to judgment. The Court said, at page 293:

"In this connection it may be observed that while in section 1 of the Act of 1876, it is expressly provided that a creditor who is entitled to call upon the Comptroller of the Currency to institute involuntary proceedings against a national bank must have reduced his demand to judgment, by section 2 'any creditor' may

file a bill against the shareholders of a bank in voluntary liquidation."

Respondent urged in the court below that Section 2 of the Act authorizing the appointment of receivers of national banks (Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63; 12 U. S. C. A. §65) applied only to solvent banks and so therefore could not apply here. The case of *City National Bank of Huron v. Fuller* (C. C. A. 8th), 52 Fed. (2d) 870, was cited as authority on that point. However, in *Southwest National Bank v. Farracy* (D. C., N. D. Tex.), 50 Fed. (2d) 959, it was held that said provision "may be advantaged by either a solvent or insolvent institution." This latter statement is sound law. Were it not so, then why did Congress provide that in cases of voluntary liquidation a creditor might resort to appropriate legal action to enforce the stockholder's liability? If the bank in voluntary liquidation is not insolvent then there can be no stockholder's liability, and so, *a fortiori*, no suit to enforce that liability would be necessary. Further proof that said provision applies to insolvent banks is the fact that in many cases where this provision has been resorted to and held to apply the banks in liquidation were insolvent. Some such cases are: *Cent. Nat. Bk. v. Conn. Mut. Life Ins. Co.*, 104 U. S. 54; *Richmond v. Irons*, 121 U. S. 27; *Schrader v. Mfgrs. Nat. Bk.*, 133 U. S. 67; *Commercial Nat. Bk. v. Weinhard*, 192 U. S. 243; *Hightower v. Am. Nat. Bk.*, 263 U. S. 351; *Williamson v. Bank* (C. C. A. 5th), 115 Fed. 793, affirming (C. C., D. S. C.) 109 Fed. 36; *King v. Pomeroy* (C. C. A. 8th), 121 Fed. 287; *George v. Wallace* (C. C. A. 8th), 135 Fed. 286, affirmed in *Wyman v. same*, 201 U. S. 230, and *Frenza v. same*, 201 U. S. 244, and *Poppleton v. same*, 201 U. S. 245; *Standard Trust Co. v. Coml. Natl. Bank* (C. C. A. 4th), 240 Fed. 303; *First Nat. Bk. v. Harris* (C. C. A. 8th), 27 Fed. (2d) 117; *Derschield v. Andrew* (C. C. A. 8th), 34 Fed. (2d) 884.

In *Williams v. Travis* (C. C. A. 5th), 277 Fed. 134, 137, it was said:

> "The statute providing for the enforcement of stockholders' individual liability on voluntary dissolution of a national bank by bill in equity, in the nature of a creditors' bill, brought in behalf of all creditors of the bank (19 Stat. 63), is a recognition of the existence of the relation of debtor and creditor between a liquidating bank's stockholders and its creditors. That relation exists between the stockholders of a failed bank and its creditors before the accrual of a right of action to enforce the payment of the ascertained amount required by law."

5.

In considering the time when the stockholder's liability becomes fixed or due and owing a distinction must be made between national banks in liquidation and those for which a receiver has been appointed.

In the opinion of the District Court (R. 56) adopted by the Circuit Court of Appeals as its opinion (R. 83), it is said that "the statute found in 12 U. S. C. A. 65, providing for the fixing of the liability by the Court, as to banks in liquidation, could not advance the time of the defendants' liability, unless court proceedings had been taken thereunder." The cases of *Scovill v. Thayer*, 105 U. S. 143, and *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184, were cited as support for that view. In this respect, it is respectfully submitted that the lower Court was in error. In the first place, 12 U. S. C. A. 65 (Act of Cong., June 30, 1876, c. 156, §2 19 Stat. 63), does not provide for the "fixing" of the liability. That section provides that the individual liability of the shareholders "may be enforced" by any

creditor. There is a decided difference between "fixing" and "enforcing" said liability. Secondly, a distinction was recognized by this Court in the case of *McDonald v. Thompson*, 184 U. S. 71, between actions brought by creditors under Section 5220 of the National Banking Act (providing for voluntary liquidation) and those brought by a receiver under Section 5234 (authorizing the Comptroller to step in, in the event of insolvency), to recover stockholder's assessment and in this connection Mr. Justice Brown, speaking for the Court, said (at p. 76):

> "But it is also sufficient to say of this that the action is not brought by the creditors under the second section of the Act of June 30, 1876, but by the receiver under Rev. Sta. Sec. 5234. In such cases no debt becomes due to the receiver as such until a deficiency has been ascertained and an assessment made, when the statute begins to run. Scovill v. Thayer, 105 U. S. 145; Hawkins v. Glenn, 131 U. S. 319."

Point C.

When a trustee disclaims title to burdensome property vested in him by operation of law, he cannot reconfer title in the bankrupt together with its attendant burdens or obligations without some affirmative action on the latter's part.

By the adjudication in bankruptcy and the appointment of the trustee, the bankrupt in this case was divested of all title to his property, and that title vested in the trustee as of the date of filing the petition in bankruptcy. Certainly there can be no doubt that such is the law.

It is likewise the law that the trustee may abandon any of the property of the bankrupt that he deems burdensome

and worthless for the purposes of the bankrupt estate. It was argued below that the title to such abandoned property remains in or reverts to the bankrupt upon the exercise of the trustee's right of abandonment, and from this it is asserted in effect, that the obligations which attached to the abandoned property likewise remain in or revert to the bankrupt and are not discharged in the bankruptcy proceedings.

It is true that the courts have on many occasions said that the title to abandoned property revests in the bankrupt. However, there is no justification for the assertion that an abandonment of the property amounts to a reinstatement of the obligations affixed thereto.

As to encumbered property abandoned by the trustee, the Court *In re Webb*, 54 Federal (2d) 1065, 1067 (C. C. A. 4th), said that "The property and the right of redemption remains in or reverts to the bankrupt." There is, however, no law that has come to petitioner's attention by which it can be said that the bankrupt by reason of the abandonment is compelled to assert his right or title thereto. While there seems to be no direct statement of law on that specific question, there is, nevertheless, an answer to be found by inference in statements made in several of the cases. In *First National Bank of Jacksboro v. Lasater*, 196 U. S. 115, the Court, speaking of trustees in bankruptcy, said (at p. 119), "If they decline to take the property, the bankrupt *can assert* title thereto." This statement of this Court seems to indicate that it is for the bankrupt to elect to assert or claim the title to the abandoned property.

In *re Wattley*, 62 Fed. (2d) 828, 829 (C. C. A. 2d), the Court said: "When property is abandoned, the bankrupt *may reassert* whatever title he had before bankruptcy."

In the case of *In re Webb*, 54 Fed. (2d) 1065, 1067 (C. C. A. 4th), the Court, in speaking of the title to abandoned

property said, "The bankrupt *has a right to assert* his title thereto."

In all of the above cited authorities, it is certainly apparent that the Court regarded as necessary some overt act on the part of the bankrupt before he could be said to have accepted the return of the title of the property so abandoned. No Court has yet said that after having been adjudicated a bankrupt and the bankrupt having been discharged from the burden of the obligations attached to his property, that same burdensome and onerous property which in all probability compelled his bankruptcy, can be thrown back upon him with all its burdens by the mere act of abandonment by trustee.

The trustee is the representative of the creditors. In fact, he is chosen by them. His status and duties are fully outlined in the case of *Imperial Assurance Company v. Livingstone,* 49 Fed. (2d) 745 (C. C. A. 8th). His abandonment and rejection of burdensome and onerous property is the abandonment and rejection of the creditors which he represents. If the creditors disapprove of the abandonment, they have the right to register objection by appropriate court action. If they do not register their objection, they thereby approve, in effect, what the trustee has done. Certainly the creditors, acting through the trustee, cannot by rejection and abandonment of property throw back the title thereto to an unwilling bankrupt, together with all its attendant obligation from which the bankrupt sought discharge. If such is the law, then the real purpose of the Bankruptcy Act cannot be accomplished. Then, too, if such could be done it would enable the creditor to withdraw or exclude his claim from the effect of a discharge. Certainly it cannot be said that personal property which is subject to the lien of a chattel mortgage can be abandoned by the trustee because it is burdensome and onerous

and thus cast back upon the shoulders of the bankrupt the obligation to pay the chattel mortgage debt. Neither can the trustee abandon a real property asset subject to mortgage and so throw back upon the bankrupt the title thereto, together with all the mortgage obligation, unless the bankrupt should choose to accept it. Property which is the subject of judgment lien might be abandoned by the trustee, but certainly by so doing it cannot be said that the title reverts to the bankrupt and with it the obligation to pay the judgment. If such is the law, the policy of the Bankruptcy Act to discharge the bankrupt from his debts and liabilities and enable him to take a fresh start would, in most cases, never be accomplished. It is respectfully submitted that ownership as distinguished from title to property can only be said to exist where the owner exercises some rights pertaining thereto.

There is no proof in this case which warrants the conclusion that petitioner was the legal owner of the stock in question at the time the assessment was made. On the application to strike the answer, the plaintiff, respondent herein, submitted an affidavit which appears on page 25 of the transcript of record. There is no proof in that affidavit that the defendant was the owner of the stock in question. There is merely a statement of the particulars of the suit upon which the plaintiff hoped to succeed. If, however, the statement in that affidavit can be taken to be a proof of title or ownership, the affidavit which was filed on behalf of the defendant, petitioner herein (R. 33), presents facts which refute the allegations of ownership as a matter of law.

VI.

CONCLUSION.

It is, therefore, respectfully submitted that in consideration of the facts of this case and the law applicable thereto, it should be determined that petitioner herein is not liable for the payment of the claim of respondent as set forth in the complaint filed in this suit, and that the judgments of the District Court and of the United States Circuit Court of Appeals for the Third Circuit should be reversed.

Wm. Elmer Brown, Jr.,
Counsel pro se.

Supreme Court of the United States

OCTOBER TERM, 1936

No. 575

WILLIAM ELMER BROWN, JR.,

Petitioner,

vs.

EDWARD J. O'KEEFE, Receiver of THE UNION NATIONAL BANK OF ATLANTIC CITY, NEW JERSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Reply Brief of Petitioner

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Supreme Court of the United States

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Reply Brief of Petitioner

STATEMENT.

This memorandum is filed in reply to certain of the arguments advanced in the brief of respondent and for the purpose of discussing some of the authorities cited therein.

I.

REPLY TO RESPONDENT'S POINT IV—A-1 (Brief, p. 5).

It is urged by respondent that "debts" as comprehended by Section 63-a-4 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. §103), includes only those claims as "were fixed in amount or were susceptible of liquidation as of the date of the filing of the petition." *Zavela v. Reeves*, 227 U. S. 625, and *Manhattan Properties v. Irving Trust Co.*, 291 U. S. 320, are cited (B. 6) as authority. It is argued that the stock liability is not in existence until assessed and therefore not due and owing until then. This is in effect saying that the limitation of Section 63-a-1 must be read into 63-a-4.

This Court said in *Maynard v. Elliott*, 283 U. S. 273, 277, that the case of *Zavela v. Reeves, supra*, does not support that contention. *In re Paramount Publix Corporation*, 73 F. (2d) 219 (C. C. A. 2, 1934), it is said (p. 221):

> "In Manhattan Properties v. Irving Trust Co., * * *, the case of Maynard v. Elliott is mentioned three times without criticism. Under such circumstances it cannot be supposed that the general rule laid down in Maynard v. Elliott and Williams v. U. S. Fidelity that claims 'founded upon contract, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, may be proved * * * although not absolutely owing when the petition is filed' was done away with *sub silentio* in Manhattan Properties v. Irving Trust Co. The latter decision merely made it clear that this rule did not affect settled doctrines of long standing relating to provability in bankruptcy of claims for future rentals under leases."

"Debt" is defined, in §1 (11) of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §1, 30 Stat. 544; 11 U. S. C. §1), to include "any debt, demand or claim." It was said in *Maynard v. Elliott* (at p. 275) that "the obligation of an endorser is at least a 'claim,' and hence a debt so far as defined by §1 (11); and the language of §63, which permits proof of a claim 'founded • • • upon contract, express or implied,' is broad enough to embrace the liability of an endorser upon negotiable paper which has not matured at the time of the adjudication." So also might the same be said of stockholder's liability to assessment.

II.

REPLY TO RESPONDENT'S POINT IV—A-2.

It is contended (B. 7 and 8) that by decision in *McClaine v. Rankin*, 197 U. S. 154, this Court overruled all prior holdings that the liability of a stockholder of a national bank was contractual and that since that decision "it appears conclusively that the liability • • • arises by force of the statute upon which it is based." The cases of *Christopher v. Norvell*, 201 U. S. 216, and *Forrest v. Jack*, 294 U. S. 158, are also referred to.

Inasmuch as great reliance is placed in *McClaine v. Rankin, supra*, it is well to carefully analyze the opinion in that case. This is well done by the Circuit Court of Appeals for the Ninth Circuit in *Erickson v. Richardson*, 86 F. (2d) 963, 969, 970. It is there pointed out that this Court regarded the statutory liability of the stockholder as "quasi-contractual" and the question as stated in that case expressed "a classification between 'simple contracts' and quasi contracts, or contracts provided by statute but created by subsequent acts of the obligor, the framework

of whose obligation is determined by the statute." It is further noted that the McClaine case cites with approval *Platt v. Wilmot,* 193 U. S. 602, in which it was decided that a State bank stockholder's liability was "created by statute, because *the statute is the foundation for the implied contract arising from the purchase of, or subscription for, the stock.*" (Italics supplied.) Continuing, the Court in the Erickson case further quotes from the opinion in *Platt v. Wilmot,* as follows:

> "Also, *while the liability is contractual in its nature,* it arises out of the Constitution or the statute, or from a combination of both, by virtue of the application of general principles of law to the facts in the case. Neither the Constitution nor the statute says that the liability is contractual, but, as the Constitution and statute existed, the liability arising therefrom, as against the stockholder, is because of the principle of law which works out a *contractual* liability upon these facts, and it may be fitly described as the common law."

Finally the Court, in the Erickson case, concludes by saying:

> "We cannot agree with appellant that the phrase 'contract express or implied' as used in the Bankruptcy Act should be interpreted, by reason of the McClaine Case, as within the narrow area prescribed by the Washington statute imposing limitations — to 'simple contracts' as distinguished from all other obligations having a contractual nature."
>
> "The criterion of Maynard v. Elliott, *supra,* requires the broader interpretation."

In the case of *Christopher v. Norvell, supra,* cited by respondent herein, the question was whether a married woman in Florida was liable for an assessment as shareholder in a national bank to the creditors of the bank, the

law of that State forbidding her to make binding contracts. It was there held that while there may be contractual features in this liability of a stockholder in a national bank, she was at any rate liable because the liability had been created by statute. This Court there recognized (at p. 228) that "in a limited sense there is an element of contract in her having become a stockholder."

As for the case of *Forrest v. Jack*, cited by respondent, it is sufficient to note that this Court cited *McDonald v. Thompson*, 184 U. S. 71, at pp. 73 and 74, where it is said that

> "granting *there was a contract* • • •, *this was a contract created by the statute,* • • • *implied from the express contract of the stockholders to take and pay for shares in the association.* • • • The statute was the origin both of the right and the remedy, *but the contract was the origin of the personal responsibility of the defendant.*" (Italics supplied.)

Also respondent relies upon *Pufahl v. Parks*, 299 U. S. 217, 222, but in citing from the opinion of this Court, he deletes that portion which seems to contradict his interpretation of it. The omitted portion reads as hereafter italicized:

> "The liability is imposed by the statute. *The original subscriber and likewise an immediate or remote vendee of the shares assumes a status — that of stockholder. The assumption of this status involves whatever conditions or burdens the federal statutes have imposed as incident to the holding of national bank shares.*"

Respondent also cites (R. 9) several opinions of other courts all of which are distinguishable. For instance, the case of *Laurent v. Anderson*, 70 F. (2d) 819, 823, holds that the liability is "assumed" by the purchase of the stock.

There is an abundance of authorities, dated both before and since the McClaine Case, which sustain the view that the stockholder's liability is contractual.

III.

REPLY TO RESPONDENT'S POINT IV—A-3 (B. 10).

Respondent makes the point that

> "the stock assessment liability • • • is too contingent to be the basis of a provable debt and therefore is not affected by discharge. The liability was uncertain both as to amount and time."

First as to the amount. Petitioner's liability was limited to 100% of the par value of the stock. At least to that extent it was certain and fixed. But respondent says (B. 17),

> "there was no certainty, and there could be no certainty, as to the amount of assessment which might be necessary to be levied, *i. e.*, whether it would be a 25% or a 50% or a 100% assessment."

It has been decided by this Court that claims against endorsers, sureties and guarantors on immature obligations are provable, and, therefore, dischargeable. Notably *Maynard v. Elliott, supra.* Yet it cannot be asserted with certainty how much such an obligor will be required to pay until the obligation falls due and the principal debtor defaults.

As for the stock assessment liability, assume that after an assessment of 50% is made on national bank stock A., a stockholder, is adjudicated a bankrupt. Even respondent will concede, consistently with his argument, that the assessment as made is a dischargeable debt. Further

assume that after adjudication a second assessment of 50% is made. Respondent argues that assessment made after adjudication is not provable so not dischargeable. So, pursuing respondent's argument, in the assumed case we have the unusual situation of a bankrupt relieved of 50% of his stock assessment liability and still burdened with 50% thereof despite his discharge in bankruptcy. Such a result is out of all conformity with what this Court has recognized to be the purpose of the Bankruptcy Act. As was pointed out in the Erickson Case, *supra* (p. 965):

> "The first criterion, that the statute is to be interpreted 'to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes,' would be violated by appellant's contention. Though yielding the stock to his creditors in bankruptcy, his discharge in bankruptcy would not enable him to start 'afresh free' from his 'business misfortunes.' He would still carry the 'weight of oppressive indebtedness,' for an assessment which would enrich the bank in which he no longer had a stockholder's interest."

It is asserted by respondent that there was no one who could file a claim in this case. On this basis respondent inquires, "if there was no one who could file claim, how could a bankruptcy court allow any such claim?" (B. 11.)

It was not necessary that any claim should be filed immediately after adjudication. Sec. 57-n of the Bankruptcy Act, as amended May 27, 1926 (Act of Cong., July 1, 1898, c. 541, §57, 30 Stat. 560; Feb. 5, 1903, c. 487, §12, 32 Stat. 799; May 27, 1926, c. 406, §13, 44 Stat. 666), limits the time for filing claims to "six months after the adjudication." Petitioner was adjudicated bankrupt on April 21, 1933. Respondent concedes that petitioner's liability

to assessment was subject to determination on September 30, 1933, the date when respondent contends the Union National Bank became in default to the Atlantic City National Bank under the terms of the contract between them. (B2 and 11.) This latter date occurred less than "six months after the adjudication" yet no effort was made to prove the claim. Collier in his work on Bankruptcy, Thirteenth Edition, Vol. II, p. 1180, says:

> "The filing of a clear statement of the claim in writing, duly verified, within the year" (now six months) "is sufficient, even though it may be liquidated and allowed after that time." Citing *In re Mertens* (C. C. A. 2d), 147 F. 177.

Respondent's predecessor in office, Slaughter, knew that a maximum assessment was to be made before it was levied. (R. 45.) In fact, he deducted such an assessment from trust funds in his hands prior to levy of the assessment by the Comptroller. (R. 38.) How then can the respondent argue that the assessment was uncertain and "too contingent" to be proved prior to assessment?

In re F. & W. Grand Properties Corp., 74 F. (2d) 224 (C. C. A. 2—1934), it was held that a creditor might satisfy the requirement that proof of claim be presented within the time specified by §57-n by beginning liquidating litigation within that period.

In re Gellman, 13 F. Supp. 643 (D. C., W. D. N. Y.—1936), it was held that an unliquidated claim arising out of alleged negligence of bankrupt is a provable debt if reduced to judgment within 30 days before or after expiration of six months from adjudication. In this case adjudication occurred on May 28, 1935, the litigation was commenced on Dec. 11, 1934 and was concluded on Feb. 11, 1936. The Court indicated in its opinion that if the claimant had presented some instrument within the period

of six months which would establish the relation of debtor and creditor it might be considered a proof of claim amendable after the expiration of six months.

See also *Irons v. Manufacturer's National Bank* (C. C., N. D. Ill.), 17 F. 308, (petitioner's main brief, p. 31) and *In re Paramount Publix Corporation*, 8 F. Supp. 644, affirmed 72 F. (2d) 219 (C. C. A. 2).

In answer to respondent's query, "how could a bankruptcy court allow any such claim," the Court, in the Irons Case, said (at p. 314) "the court of bankruptcy would undoubtedly have given time, and so far delayed the proceedings as to enable such an estimate to be made before closing the affairs of the bankrupt estate and ordering a final dividend."

IV.

REPLY TO RESPONDENT'S POINT B-1 INSOFAR AS IT REFERS TO ERICKSON V. RICHARDSON.

Erickson v. Richardson is cited in petitioner's main brief (p. 27). At the time of the filing of that brief the only reference to that case available to petitioner was the Commercial Clearing House Bankruptcy Law Service mentioned. It has since been reported in 86 F. (2d) 963. What was thought to be the opinion of the Court quoted in petitioner's main brief (p. 27) turns out to be merely the Law Service comment thereon.

The majority opinion of the Court in the Erickson case is a thorough, logical and exhaustive treatise of all the points here involved. It might well be adopted as a brief for petitioner in this case.

Respondent attempts to distinguish the Erickson case on three grounds. (B. 14) The first is that the bank in

that case had been declared insolvent before the stockholder's adjudication. Inquiry into the facts of the instant case will disclose that it cannot be differentiated from the Erickson case on that ground. If respondent is here taking the position that insolvency is the condition which fixes the stockholder's liability then that condition had happened in the instant case. It was admitted on the motion to strike (which is in the nature of a demurrer) that the Union National Bank was insolvent prior to petitioner's adjudication in bankruptcy. So in that respect the two cases are similar.

Throughout every other part of respondent's brief it is contended that no liability on national bank stock is fixed and, therefore, provable until assessment is made thereon. And further, that inasmuch as the assessment on petitioner's stock had not been made at the time of his adjudication it was not a provable and dischargeable debt.

In the Erickson case the assessment was levied about two months after the date upon which the petition in bankruptcy was filed. In the instant case the assessment was made about five months after filing petition. In this respect, therefore, both cases are similar.

Respondent secondly argues that the trustee in the instant case had abandoned the stock and thus revested title in the petitioner whereas in the Erickson case there had been no abandonment by the trustee. This is not a distinguishing feature. It has no bearing on the question whether the stock liability is dischargeable in bankruptcy prior to assessment which is the principal question involved in this and the Erickson cases.

Thirdly, respondent contends that the Erickson case is distinguishable because the Court in that case, "in holding that the assessment claim was a debt arising out of a contract and consequently provable in bankruptcy, followed

the construction placed upon the Constitution of the State of California by the highest court of that State." The law construed was a California statute (Act 652a, 1 General Laws, California, 1931, p. 314) and it is sufficient answer to respondent's contention to note that the provisions of that Act are identical with the corresponding section of the National Banking Act (Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273; 12 U. S. C. §64).

Respondent points to the dissenting opinion in the Erickson case as the better law. A study of both the prevailing and dissenting opinions of the court in that case will not support the contention of respondent.

Both opinions in the Erickson case refer to the instant case as decided in the Circuit Court of Appeals (p. 972). It is pointed out that it was "held, *rightly or wrongly,* that his" (petitioner herein) "bank stock had never passed to the trustee in bankruptcy." Finally the court (C. C. A. 9) in the Erickson case refuses to follow the opinion here "whether it be dictum or decision." And it is there commented (p. 972), "it is contrary to the more recent holding of the Sixth Circuit in *Barbour v. Thomas, supra,* and to that of the Fourth Circuit in *Chisholm v. Gilmer, supra,* and fails to consider any of the federal authorities on which this opinion is based."

CONCLUSION.

It is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

WM. ELMER BROWN, JR.,

Counsel pro se.

FILED
MAR 1 1937
CHARLES ELMORE CROP
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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Petitioner,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 575

WILLIAM ELMER BROWN, JR.,

Petitioner,

vs.

EDWARD J. O'KEEFE, RECEIVER OF THE UNION NATIONAL BANK OF ATLANTIC CITY, NEW JERSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

I.

Statement of Facts.

As of September 30, 1931, the Union National Bank of Atlantic City entered into a contract with the Atlantic City National Bank (R. 38-40), by the terms of which the Atlantic City National Bank took over all of the assets of the Union National Bank of Atlantic City and assumed all of its liabilities to depositors and creditors. The Union National Bank, in effect, warranted to the Atlantic City National Bank that the assets so conveyed would equal,

when liquidated, the amount of the liabilities assumed by the purchaser. The agreement further provided that the Atlantic City National Bank would liquidate the assets of the Union National Bank, said period of liquidation to terminate at the expiration of two years from the date of the agreement, at which time the liability of the Union National Bank to the Atlantic City National Bank would be determined by deducting from the indebtedness assumed by the Atlantic City National Bank: (1) the value of the bank building and fixtures at an agreed price of $353,000.00; and (2) the amount realized by the liquidation of the other assets of the Union National Bank as of the date of the expiration of the agreement (R. 39).

Immediately after the execution of this contract, the Atlantic City National Bank assumed all the deposit liability of the Union National Bank. The practical result of the agreement was that the former depositors of the Union National Bank became, in fact, depositors of the Atlantic City National Bank.

The contract was approved by the shareholders of the Union National Bank at a meeting held on December 15, 1931, and a resolution was adopted by said shareholders placing the Union National Bank in voluntary liquidation under the provisions of 12, U. S. C., Sec. 181 (*infra* p. 15), and appointing the Atlantic City National Bank liquidating agent (R. 35, 36).

Prior to and on the date of the contract of September 30, 1931, the petitioner here, William Elmer Brown, Jr., was the registered owner of ten shares of the capital stock of the Union National Bank of Atlantic City. On April 21, 1933, he filed a voluntary petition in bankruptcy and was as of that date adjudicated a bankrupt by the United States District Court for the District of New Jersey (R. 36).

In the schedules filed by Petitioner in the bankruptcy proceedings, he listed as one of the debts from which he

sought to be discharged, his possible liability to assessment on the ten shares of the capital stock of the Union National Bank of Atlantic City held by him (R. 37), although at the time of the filing of said petition in bankruptcy, no receiver for the Union National Bank had been appointed, and no assessment had been levied upon its stockholders, and the Union National Bank was not then in default to the Atlantic City National Bank under the terms of the said contract of September 30, 1931 (R. 3, 4; 38, 39, 40). Clarence Knauer was appointed trustee in bankruptcy of the Petitioner and as such trustee there came into his hands the ten shares of capital stock of the Union National Bank of Atlantic City registered in the name of and owned by the Petitioner (R. 31). Petitioner was discharged in bankruptcy on July 31, 1933 (R. 7), which, it will be observed, was two months prior to the date on which the Union National Bank became in default to the Atlantic City National Bank under the terms of said contract dated September 30, 1931 (R. 38-40).

The trustee, after investigation, concluded there was no equity in the stock and that it would be burdensome to the bankruptcy estate. Accordingly, he presented a petition to the Referee in Bankruptcy for authority to abandon all title to and disclaim all interest in the stock (R. 31). Pursuant thereto, the Referee in Bankruptcy, by order dated October 27, 1933, directed the trustee to abandon all title to and disclaim all interest in the stock (R. 32). The misapprehension of the court below, indicated in its original opinion (R. 70, 71), to the effect that the trustee did not obtain a court order authorizing a rejection of the stock as a burdensome asset, was corrected in its subsequent opinion after rehearing (R. 82, 83, 84).

On December 13, 1933, the Comptroller of the Currency determined that the Union National Bank was insolvent and appointed Respondent's predecessor in office, Laurence

A. Slaughter, Receiver of said bank (R. 27). On January 8, 1934, the Comptroller of the Currency levied a stock assessment of 100% upon the capital stock of the said bank, and directed respondent's predecessor to take all necessary proceedings by suit or otherwise to enforce to that extent the individual liability of the shareholders of the bank (R. 29). It will be observed that the date of the levy of the assessment was more than five months subsequent to the date of the Petitioner's discharge in bankruptcy (R. 7).

II.

Questions Presented.

We believe the statement in Petitioner's brief as to the questions presented is sufficient.

III.

Summary of Argument.

A. PETITIONER'S LIABILITY FOR STOCK ASSESSMENT WAS NOT A "PROVABLE DEBT" AS OF THE DATE OF THE FILING OF THE PETITION IN BANKRUPTCY AND THEREFORE WAS NOT DISCHARGED.

(1) Bases upon which claims are provable in bankruptcy.

(2) National bank shareholders' liability is statutory and where assessment is not levied until after filing of petition in bankruptcy the liability is not affected by discharge.

(3) Assuming for discussion only that the stock assessment liability is contractual, it is too contingent to be the basis of a provable debt and therefore is not affected by discharge.

B. REPLY TO PETITIONER'S ARGUMENTS.

(1) Discussion of principal cases relied upon by Petitioner.

(2) Shareholders' liability does not become enforceable until assessment is levied.

(3) Ownership of stock abandoned by trustee in bankruptcy remains vested in bankrupt.

IV.

ARGUMENT.

A.

PETITIONER'S LIABILITY FOR STOCK ASSESSMENT WAS NOT A "PROVABLE DEBT" AS OF THE DATE OF THE FILING OF THE PETITION IN BANKRUPTCY AND THEREFORE WAS NOT DISCHARGED.

(1) Bases upon which claims are provable in bankruptcy.

The only basis upon which claims are provable in bankruptcy, which needs to be discussed here, is the one upon which the Petitioner relies, i. e.:

> "(a) Debts of the bankrupt may be proved and allowed against his estate which are * * *; (4) founded upon an open account, or upon a contract express or implied; * * *" (11 U. S. C. 103 (a) 4).

The position of the Petitioner is that at the time he was adjudicated a bankrupt, his liability for the stock assessment was a debt founded upon "a contract express or implied" and that consequently, by virtue of his discharge in bankruptcy, he is relieved from the payment of the stock assessment subsequently levied by the Comptroller of the Currency (Petitioner's Brief p. 13).

Even as to claims based upon the foregoing provision of the Bankruptcy Act, the authorities are agreed that only those claims which *were fixed in amount or were susceptible of liquidation as of the date of the filing of the petition* in bankruptcy are provable.

In *Collier on Bankruptcy* (13th Ed.), Vol. II, p. 1375, it is stated:

> "The rule is that the provability of a claim depends upon its status at the time the petition is filed. If the

> *existence* of a debt or claim, liquidated or unliquidated, is contingent at the time of the filing of the petition, it is not provable, except claims of indorsers and sureties. Subsection a (4), unlike the other subdivisions, has no words of time but it has been authoritatively decided that debts founded upon open account or upon contracts, express or implied, include only such as *existed* at the time of the filing of the petition. The word 'and' in the form of proof prescribed by the Supreme Court requiring that it should state that the debt proved existed 'at and before the filing of the petition for adjudication of bankruptcy' must be construed either 'or' or 'and' as the circumstances may require." (Italics ours.)

In *Loveland on Bankruptcy*, Vol. I, Sec. 290, p. 597, it is stated:

> "The rights of creditors to prove debts and share in the distribution of the estate of the bankrupt are fixed by the status of their claims, *at the time of* filing the petition in bankruptcy." (Italics ours.)

In *Zavela* v. *Reeves*, 227 U. S. 625, at p. 631, Mr. Justice Pitney, speaking for this Court, said:

> "Clause 4 describes simply debts that are 'founded upon an open account, or upon a contract, express or implied', not in terms referring to the time of the inception of the indebtedness. But, reading the whole of Sec. 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under *Sec. 63a, cl. 4 include only such as existed at the time of the filing of the petition in bankruptcy.*" (Italics ours.)

See also *Manhattan Properties* v. *Irving Trust Co.*, 291 U. S. 320, at p. 338.

(2) National bank shareholders' liability is statutory and where assessment is not levied until after filing of petition in bankruptcy the liability is not affected by discharge.

The Circuit Court of Appeals on re-hearing adopted the opinion of the trial court which held that under the facts in this case the obligation of the Petitioner for payment of the stock assessment did not arise out of contract express or implied, but was in the nature of a statutory liability, and that the debt arising therefrom did not become due and owing until the levy of the assessment by the Comptroller of the Currency, which was subsequent to the Petitioner's adjudication and discharge in bankruptcy.

Consideration of the question of whether Petitioner's liability for the assessment was a "debt • • • founded upon a contract express or implied", which was in existence at the time of the filing of the bankruptcy petition, necessarily involves the construction of the statute upon which the liability is based and imposed. That provision of the National Bank Act recorded in 12 U. S. C., Sec. 64, provides in part as follows:

> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. • • •"

Prior to the decision in *McClaine* v. *Rankin*, 197 U. S. 154, this Court in several cases indicated that the liability of a stockholder of a national bank was contractual in its nature, although not deciding that it was *founded upon contract*. *Richmond* v. *Irons*, 121 U. S. 27, 55; *Matteson* v. *Dent*, 176 U. S. 521, 525.

Other decisions are to the effect that the liability is *founded both upon the statute and contract*. *U. S.* v. *Knox*, 102 U. S.

422, 424; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364; *McDonald* v. *Thompson*, 184 U. S. 71, 73.

By reason of the facts in the following cases, it was determined that the liability was *based on the statute*. *Keyser* v. *Hitz*, 133 U. S. 138, 149; *Scott* v. *Deweese*, 181 U. S. 202, 213; *Studebaker* v. *Perry*, 184 U. S. 258, 261.

However, since the decision of this Court in *McClaine* v. *Rankin, supra*, it appears conclusively that the liability for assessment of a shareholder of a national bank is not founded upon contract, but arises by force of the statute upon which it is based. In that case it was held that a state statute limiting the time for bringing "an action upon a contract or liability, express or implied, which is not in writing and does not arise out of any written instrument", was not applicable in a suit for stock assessment liability brought by a receiver of an insolvent national bank, but that such class of cases fell within a limitation statute providing: "An action for relief, not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued." In the opinion at p. 161, this Court held that the provisions of 12 U. S. C. Sec. 64, creating the liability of stockholders of national banks for assessment

> "do not mean that the stockholder promises the creditor as surety for the debts of the corporation, but merely impose a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. *The liability is a consequence of the breach by the corporation of its contract to pay, and is collateral and statutory.*" (Italics ours.)

and further at pp. 162, 163, said that the limitation statute

> "*ran as against an action to enforce the statutory liability and not an action for breach of contract*" (Italics ours.)

and at p. 162, that the liability was enforceable only according to the Federal statute,

> *"independent of which the cause of action does not exist"* (Italics ours.)

In the dissenting opinion, the effect of the majority decision was pointed to as definitely overruling previous cases classifying the liability as contractual.

In *Christopher* v. *Norvell,* 201 U. S. 216, at p. 228, this Court said that the liability was "created by the statute".

In *Forrest* v. *Jack,* 294 U. S. 158, 162, it is said:

> "The liability of stockholders is based upon the statute (12 U. S. C.), Section 64." (Insert ours.)

The latest expression of this Court on this point is found in *Pufahl* v. *Parks,* 299 U. S. 217, where Mr. Justice Roberts said at p. 222:

> "The liability is imposed by the statute. • • • From the moment of the Comptroller's order for assessment the bank's receiver has a claim which would support an action of debt at common law against a living stockholder • • • ."

Other courts have recognized that the basis of the stock assessment liability is statutory. See *Laurent* v. *Anderson,* 70 F. (2d) 819, 823; *Page* v. *Jones,* 7 F. (2d) 541, 544; *Donald* v. *Bird,* 85 F. (2d) 663, 664; *Armstrong* v. *McAdams,* 46 F. (2d) 931, 932, 933; *Hendrickson* v. *Helmer* (D. C. Idaho), 7 F. Supp. 627, 628.

In view of the foregoing discussion and authorities it is the Respondent's contention that the primary basis of the liability of the Petitioner is the statute, "• • • independent of which the cause of action does not exist • • • •" *McClaine* v. *Rankin, supra,* and that it is not a debt founded upon contract express or implied within the purview of Section 63 (a) 4 of the Bankruptcy Act (11 U. S. C. 103 (a) 4, *supra,* p. 5). Consequently under the facts in this case it is submitted that such liability was not a "provable debt" at the time of Petitioner's adjudication and discharge

in bankruptcy. For this reason the discharge in bankruptcy could not in any manner affect the Petitioner's liability for the stock assessment which was levied subsequent to the filing of his petition in bankruptcy.

(3) Assuming for discussion only that the stock assessment liability is contractual, it is too contingent to be the basis of a provable debt and therefore is not affected by discharge.

The liability was uncertain both as to amount and time. It was not even certain at the time the petition in bankruptcy was filed that a stock assessment *would ever be* levied against the shareholders of the Union National Bank. Furthermore, to admit or assert the existence of a provable claim in bankruptcy based upon this liability is to admit and assert the existence of a claimant. Yet, who could file claim?

The Union National Bank, although it was still, as of that date, a corporate entity, could not file claim because the statutory stock assessment liability does not run in favor of the bank but rather in favor of the creditors thereof (See *Page* v. *Jones*, 7 F. (2d) 541, cert. den. 269 U. S. 587; *Scott* v. *Latimer*, 89 Fed. 843, affirmed *Scott* v. *Deweese*, 181 U. S. 202; *Lantry* v. *Wallace*, 97 Fed. 865, affirmed 182 U. S. 536; *Wehby* v. *Spurway*, 30 Ariz. 274, 246 Pac. 759, cert. den. 273 U. S. 722) and because the levy of an assessment by the Comptroller of the Currency is a condition precedent to the enforcement of the liability of shareholders. *Kennedy* v. *Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Page* v. *Jones, supra.*

The purchasing bank (Atlantic City National Bank) and its receiver were precluded from filing claim against the bankruptcy estate of a stockholder of the Union National Bank because a condition precedent to the assertion of an assessment claim by a creditor against shareholders of a

bank in voluntary liquidation is the filing of an appropriate action in a proper court. See 12 U. S. C., Sec. 65 and *Taylor* v. *Fontaine*, 10 S. W. (2) 68, 72; *Williamson* v. *American Bank*, 115 Fed. 793, 797; *Ames* v. *American National Bank*, 176 S. E. 204, 223; and Opinion U. S. District Court (R. 56-58). Furthermore the purchasing bank was bound by the agreement between it and the Union National Bank dated September 30, 1931, wherein it was provided that

> "The amount of the liability of Seller shall be fixed at the expiration of two years from this date, * * *."

The question of whether an assessment would be levied against the shareholders of the selling bank *could not be determined before the expiration of the two-year period* or September 30, 1933, which was subsequent to the Petitioner's discharge in bankruptcy.

There was no other person or persons who could possibly file such claims against the bankruptcy estate, and if there was no one who could file claim, how could a bankruptcy court allow any such claim? In whose favor would the claim be allowed? And for what amount?

If in every instance where a shareholder of an insolvent national bank is adjudicated a bankrupt a claim must be filed against the bankruptcy estate in the maximum amount of a stock assessment which has not been levied, then a great hardship will have been imposed upon the other creditors of the bankrupt in the event, after distribution of dividends from the bankruptcy estate to the receiver of the insolvent national bank upon the claim thus filed, it is determined that an assessment need not be levied against the shareholders of that bank. In such a case, assuming that the bankrupt has been discharged and his estate fully liquidated, the receiver of the insolvent national bank would be placed in the position of having in his possession moneys to which the creditors of his trust were not entitled and to which the bankrupt was not entitled but

to which the creditors of the bankrupt were entitled, without any means or information upon which to make a distribution to such creditors.

The Respondent's position may be best presented by quoting from the decision of this Court in *Maynard* v. *Elliott*, 283 U. S. 273, 278:

> "The contingency of the bankrupt's obligation may be such as to render any claim upon it incapable of proof. It may be one beyond the control of the creditor, and dependent upon an event so fortuitous as to make it uncertain whether liability will ever attach. In re Merrill & Baker, 186 Fed. 312. Such a claim could not be proved under the Act of 1841 although in terms permitting proof of contingent claims. Riggin v. Magwire, 15 Wall. 549. Or, the contingency may be such as to make any valuation of the claim impossible, even though liability has attached."

See also extracts from Dunbar v. Dunbar, 190 U. S. 340, 349, 350; Riggin v. Magwire, 15 Wall. 549, 551-552, and In re Pettingill & Co., 137 Fed. 143, 146-147. (Contained in Appendix, p. 24.)

It is submitted that the stock assessment liability of the petitioner was too contingent and uncertain to afford the basis of a provable claim against his bankruptcy estate; *ergo* the liability could not be affected by a discharge in bankruptcy. (For further discussion of the contingent nature of the assessment liability, see *infra*, pp. 16-17.)

B.

REPLY TO PETITIONER'S ARGUMENTS.

(1) Discussion of principal cases relied upon by Petitioner.

In the case of *Maynard* v. *Elliott*, 283 U. S. 273, strongly relied upon by the petitioner for the proposition that the assessment liability in this case was a "provable debt", it appears from the facts that the bankrupts were endorsers upon certain promissory notes which had not matured at

the time of bankruptcy, and upon which notice of dishonor had not been waived. This Court held that the future and contingent liability of an endorser of commercial paper executed before, but maturing after, the filing of the petition in bankruptcy, was a debt founded upon an express contract provable in a bankruptcy proceeding, and said at p. 278:

> "The claim against the endorser of paper not matured at the time of the bankruptcy thus stands on the same plane as contracts of suretyship or guarantee of payment of a debt not due until after the bankruptcy."

However, the statutory liability for assessment of a shareholder in a national bank is not analogous or comparable to the liability of a surety. This was definitely determined by this Court in *McClaine* v. *Rankin, supra,* where at p. 161, it said:

> "But the words of Sec. 5151 (12 U. S. C. 63), do not mean that the stockholder promises the creditor as surety for the debts of the corporation, but merely impose a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party." (Insert ours.)

See also *Hobart* v. *Johnson,* 8 Fed. 493, 495, and *Ames* v. *American National Bank of Portsmouth* (Va.), 176 S. E. 204, 224.

The case of *Maynard* v. *Elliott, supra,* is not authority for the Petitioner's position, but is, in effect, authority as aforenoted (*supra,* p. 12) for the Respondent's position that even though it be assumed that the Petitioner's stock assessment liability is founded upon a contract, express or implied, the liability is too contingent to be made the subject of a provable claim in bankruptcy.

The recent case of *Erickson* v. *Richardson* (C. C. A. 9th) 86 F. (2d) 963, cited by Petitioner appears to be the strong-

est support for his contention that the assessment liability in this case is a debt founded upon a contract, express or implied. It is believed that there are certain distinguishing features to which the Court's attention may be directed:

First, in the *Erickson* case it appears that at the time the shareholder was adjudicated a bankrupt the bank had been declared insolvent, was in the possession and custody of the Superintendent of Banks of the State of California and the assessment was levied about two months after the date upon which the petition in bankruptcy was filed. In the instant case, the Union National Bank, although placed in voluntary liquidation under 12 U. S. C., Sec. 181, had not been declared insolvent, was not in the possession and custody of the Comptroller of the Currency or a receiver appointed by him, and as stated aforesaid, the question of the necessity for an assessment was governed by the express terms of the liquidating agreement between the two banks providing for an accounting in September, 1933, which date was approximately five months subsequent to the Petitioner's adjudication in bankruptcy.

Second, in the *Erickson* case the trustee in bankruptcy had not abandoned the bank stock, whereas in the instant case the trustee in bankruptcy, by order duly entered in the bankruptcy proceedings, disclaimed and abandoned the stock, thus revesting the title thereto in the bankrupt.

Third, in the *Erickson* case the Court, in holding that the assessment claim was a debt arising out of contract and consequently provable in bankruptcy, followed the construction placed upon the Constitution of the State of California by the highest court of that State.

Under the facts in the instant case, it is believed that the dissenting opinion of Circuit Judge Haney in the *Erickson* case correctly sets forth the law applicable to the question of the nature of the assessment liability of a shareholder

of an insolvent national bank, *i. e.*, whether contractual or statutory.

(2) Shareholders' liability becomes enforceable when assessment is levied.

The Petitioner asserts that at the time of his adjudication as a bankrupt, the Union National Bank was insolvent and had been insolvent since September 30, 1931, at which time, for the purposes of liquidation, it sold its assets to the Atlantic City National Bank, and that by reason of its insolvency it was possible to fix his liability for stock assessment at the time of the bankruptcy proceedings. The liquidation contract between the two banks, dated September 30, 1931, expressly provided that:

> "The amount of the liability of Seller shall be fixed at the expiration of two years from this date, at which time all notes regardless of renewals thereof which shall then be uncollected by Buyer, shall be deemed losses."

The fact that the shareholders of the Union National Bank placed it in voluntary liquidation under the provisions of 12 U. S. C., Sec. 181, effective as of December 15, 1931, does not have any bearing whatever upon the question of the solvency or insolvency of that institution. The following statutes are applicable:

12 U. S. C., Sec. 181:

> "Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

12 U. S. C., Sec. 65:

> "When any national banking association shall have gone into liquidation under the provisions of section 181 of this title, the individual liability of the shareholders provided for by section 63 of this title may be enforced by any creditor of such association, by bill in

> equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

The Petitioner claims that under the facts of this case, the foregoing sections of the National Bank Act so operated as to bring into existence and make due and owing, the individual liability of the shareholders of the Union National Bank upon its decision to go into voluntary liquidation. It should be clear that no such result can be read into these provisions because it is well settled that placing the corporation into voluntary liquidation under the statute, does not put an end to the corporate existence of the bank, *Central National Bank* v. *Connecticut Mutual Life Insurance Co.*, 104 U. S. 54, 73-76; nor does it import insolvency of the bank. See *Southwest National Bank* v. *Farracy*, 50 F. (2d) 959, 960, 961; *Green* v. *Bennett*, 110 S. W. 108, 115.

It is submitted that although 12 U. S. C., Sec. 65 does authorize any creditor of a national bank in voluntary liquidation to enforce the shareholders' liability by bill in equity, it would seem clear that said section could have no application to the instant case inasmuch as there was no certainty at the time of the adjudication of Petitioner in bankruptcy (April 21, 1933), that there *would be* any liability of the Union National Bank to the Atlantic City National Bank for which the shareholders of the former would be responsible, and the question of liability was not subject to determination, under the contract, until September, 1933; furthermore, even though it might have been considered, on April 21, 1933, that a possibility existed that in September, 1933, a deficiency would be fixed under the contract, there was no certainty that an assessment would be levied to meet the deficiency. It is common knowl-

edge that banks which have been placed in receivership on the ground of insolvency, not infrequently pay out 100% to depositors and creditors without the levy of an assessment due to subsequent appreciation in value of assets or reduction of liabilities. (See annual reports of Comptroller of Currency to Congress; see also 12 U. S. C. Sec. 197, indicating that Congress contemplated there would be cases of receivership banks wherein a surplus would be returnable to shareholders after payment of creditors in full.) The same situation could conceivably exist as to a bank in voluntary liquidation. Finally in this connection even if it were contemplated on April 21, 1933, first, that a liability would arise under the contract and second, that an assessment might be levied, there *was* no certainty, and there *could be* no certainty, as to the amount of assessment which might be necessary to be levied, *i. e.*, whether it would be a 25% or a 50% or a 100% assessment. Until the amount of assessment is fixed, either by levy by the Comptroller (in case of receivership) or by decree of court under 12 U. S. C. Sec. 65 (in case of voluntary liquidation) no cause of action arises, and the amount of the assessment, if any, cannot be known. **Obviously with all of these uncertainties involved, the assessment claim would be too contingent a liability to admit of filing in a bankruptcy proceeding and to be the basis of the payment of dividends thereon to the claimant filing it.**

An analysis of the cases instituted under authority of 12 U. S. C., Sec. 65 and relied upon by the petitioner for the proposition that his liability to assessment was capable of liquidation and enforcement reveals that in each instance the bill was filed on behalf of a creditor of the bank whose claim was at that time, due, owing, and certain in amount. *See Wyman* v. *Wallace*, 201 U. S. 230, 232, 242; *Hightower* v. *American National Bank*, 263 U. S. 351, 352, 353; *Richmond* v. *Irons*, 121 U. S. 27, 28; *American National Bank* v. *Commercial National Bank*, 254 Fed. 249, 257, 258.

Notwithstanding the fact that the Union National Bank was in voluntary liquidation until December of 1933, at which time a receiver was appointed, *a cause of action did not arise against the Petitioner for the assessment until the levy of the assessment against the shareholders* of the Union National Bank by the Comptroller of the Currency, after the bank had been declared insolvent and a receiver appointed to take possession and custody of its assets. *Forrest* v. *Jack*, 294 U. S. 158, 162; *Kennedy* v. *Gibson*, 8 Wall. 498, 505; *Deweese* v. *Smith*, 106 Fed. 438, 441, aff. 187 U. S. 637; *King* v. *Pomeroy*, 121 Fed. 287, 297-8; *Aldrich* v. *Skinner*, 98 Fed. 375, 377.

The courts have consistently recognized the discretionary authority granted the Comptroller of the Currency under the National Banking Laws to levy assessments against shareholders of insolvent national banks being liquidated under his supervision, and have uniformly held that his judgment and discretion in this connection is final and conclusive. *Kennedy* v. *Gibson*, 8 Wall. 498, 505; *Casey* v. *Galli*, 94 U. S. 673, 677; *Germania National Bank* v. *Case*, 99 U. S. 628, 634, 635; *United States* v. *Knox*, 102 U. S. 422, 425; *Bushnell* v. *Leland*, 164 U. S. 684; *Forrest* v. *Jack*, 294 U. S. 158, 162.

(3) Ownership of stock abandoned by trustee in bankruptcy remains vested in bankrupt.

Petitioner in his answer in the trial court had filed the following Affirmative Defense (R. 6, 7):

> "1. On April 21, 1933, defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey and all right, title and interest of the defendant in and to the said ten shares of stock by act of law was immediately transferred to and vested in the trustee duly appointed for said defendant bank-

rupt, whereupon the defendant lost all dominion and control over the said shares of stock.

"2. Said trustee has not disclaimed title to the said ten shares of stock to defendant.

"3. At the date of the assessment levied as aforesaid defendant in law and in fact was not the legal or equitable owner of said ten shares of the stock of said Union National Bank of Atlantic City, N. J., upon which said assessment was levied.

"4. The title to said stock was transferred to and vested in the said trustee by act of law more than sixty days prior to the appointment of the said receiver."

Respondent moved to strike this defense as being sham, because the Trustee in Bankruptcy had, in fact, disclaimed title to the stock; and in support of this motion, filed the Affidavit of the Trustee with the Order of the Referee in Bankruptcy dated October 27, 1933, directing the abandonment (R. 31, 32) annexed thereto. During the argument before the trial court on this motion, Petitioner specifically consented to the striking of the first defense thereby admitting that he was the owner of the stock at the time the assessment was levied. This clearly appears from the following portion of the opinion of the trial court, which was adopted by the Circuit Court of Appeals. (R. 47, 48, 83):

"In the complaint it is alleged that defendant at the time the assessment was levied owned ten shares of the capital stock of the bank, of a par value of $100 per share. The assessment, made on January 8, 1934, was 100 per cent. The defendant's alleged liability is $1000. The answer admits all of the material allegations of the complaint, but sets up thirteen separate defenses as a bar to the action. The first defense states that defendant was adjudicated a bankrupt on April 21, 1933, and that by reason thereof from that time on he was not the legal or equitable owner of said shares of stock, and consequently is not liable for the assessment. It is not

necessary to discuss this defense as defendant in his brief consents that it be stricken."

Petitioner urges in his brief (p. 7) that the first defense was merely surplusage and that the striking thereof did not prove him to be the owner of the stock. Obviously, by admitting that the title to the stock was not in the trustee, it must logically follow that the ownership was in Petitioner, inasmuch as the stock still continues to stand in his name on the books of the bank. That the record owner may be held liable for the assessment is settled by the decisions of this Court. *Whitney* v. *Butler,* 118 U. S. 655, 660; *Richmond* v. *Irons,* 121 U. S. 27, 58; *Matteson* v. *Dent,* 176 U. S. 521, 530; *Forrest* v. *Jack,* 294 U. S. 158, 162.

Assuming for discussion only, that Petitioner did not, upon the pleadings, admit ownership of the stock (as found by the trial court and Circuit Court of Appeals), it is respectfully submitted that upon the election of the trustee to reject the stock, and the entry of the order of disclaimer and abandonment of the same by him, the title and ownership of the stock remained in or reverted to the bankrupt by operation of law. In *Remington on Bankruptcy,* Volume 2, Sec. 1159, p. 499, it is said:

> "Upon abandonment title revests in the bankrupt, subject, of course, to all undischarged liens, etc."

In *Loveland on Bankruptcy,* Volume 1, Sec. 375, p. 774, the author states:

> "Where the trustee elects not to take the property or right of the bankrupt and charge the estate with it, the property and right whatever it is, remains in the bankrupt."

In the case of *In re Frazin,* 183 Fed. 28, Circuit Judge Noyes, speaking for the Circuit Court of Appeals for the Second Circuit, after reviewing all the cases, said, at p. 32:

"In our opinion, upon principle and authority, a trustee, having the option to assume or reject a lease, takes title to such lease only in case he elect to accept it. If he elect to accept it, then, by virtue of the provision of the bankruptcy act already quoted, the vesting of the title relates back to the date of adjudication. But, if the trustee do not elect to accept the lease, it remains the property of the bankrupt."

In *Mills Novelty Co.* v. *Monarch Tool and Mfg. Co.* (C. C. A. 6), 49 F. (2d) 28, the Court said on page 31:

"Some property, however, may carry such burdens that the trustee is not obliged to accept, but has an election to accept or reject, and the title does not pass to and vest to him in the same unconditional way. Where there is property of this character, it would seem that the title passes to the trustee upon condition subsequent. If he decides not to accept, the implied condition is broken and the title revests in the bankrupt—if indeed there has ever been more than a tender of the title. In the event of such rejection, it is clear that no formal conveyance by the trustee to the bankrupt is required. Sessions *v.* Romadka, 145 U. S. 29, 39, 12 S. Ct. 799, 36 L. Ed. 609."

In *Sessions* v. *Romadka,* 145 U. S. 29, Mr. Justice Brown, in discussing the effect of an abandonment by an assignee in bankruptcy of property of a bankrupt under the bankruptcy law of 1867, said at pp. 51-52:

"In such case the abandonment relates back to the commencement of the proceedings in bankruptcy, and the title stands as if no assignment had been made. Such abandonment is not so much a transfer of an existing interest in the assignee, as an election on his part to treat the assignment as having never included that claim."

See also *Mesirov Trustee* v. *Innis Speiden & Co.,* 88 N. J. L. 548, 550, 97 Atl. 160, 161; *Smith* v. *Wahl,* 88 N. J. L. 623, 97 Atl. 261; *Kirstein Holding Co.* v. *Bangor Veritas, Inc.* (Me.),

163 Atl. 655, 656; *Fleming* v. *Courtenay* (Me.), 57 Atl. 592, 595.

If the trustee does not dispose of the bankrupt's property in the ordinary course of administration, and rejects the property as a burdensome asset, to whom does it then belong? Not to the trustee, because he has rejected it. Not to the creditors of the estate, because they are represented by the trustee, who has renounced it. In such a case it appears that title must and should remain in the bankrupt, regardless of the lack of any affirmative action on his part. An analogy is found where a trustee in bankruptcy (prior to the recent amendments to the bankruptcy act) declined to accept a leasehold interest of the bankrupt. In such a case when the trustee rejected the lease, the term remained vested in the bankrupt without any affirmative action on his part whatsoever, and he continued to be liable for the rent accruing during the balance of the term. See the remarks of Mr. Justice Roberts in *City Bank Farmers' Trust Company* v. *Irving Trust Company, et al.* (No. 260, October Term, 1936), decided January 4, 1937.

The Court's attention is directed to the fact that in most of the cases above cited on this point there was no formal order directing the trustee to disclaim. In such cases, however, it was held the facts showed an election on the part of the trustee to reject, with the result that the property remained vested in the bankrupt. *A fortiori* in the instant case, a formal order having been entered directing the trustee to disclaim title to the stock in question, it remained vested in Petitioner and he continued to be the owner thereof.

Conclusion.

It is respectfully submitted that the opinion of the District Court and Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX.

In *Riggin* v. *Magwire*, 15 Wall. 549, 551-552, this Court stated:

> "It is argued that under the right given by the fifth section of the Bankruptcy Act of 1841 to prove "uncertain and contingent demands," the claim in this case could have been proven under the act. But the better opinion is, that as long as it remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the act of 1841. See 1 Smith's Leading Cases, notes to Mills *v.* Auriol, by Hare. In 1843 Martin Thomas was still living, and there was no certainty that his wife would ever survive him. It was uncertain whether there would ever be any claim or demand. On what principle, then, could the covenant have been liquidated or reduced to present or probable value? • • • But, without authority from the statute, the assignee would not have been justified in receiving such an estimate and making a dividend on it."

In *Dunbar* v. *Dunbar*, 190 U. S. 340, 349-350, it was stated:

> "Section 63*a* (of the Bankruptcy Act of 1898) provides for debts which may be proved, which, among others, are (1) 'A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest on such as were not then payable and did not bear interest;' (4) 'founded upon an open account, or upon a contract express or implied.'
>
> "In section 63*b* provision is made for unliquidated claims against the bankrupt, which may be liquidated

upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph *b*, however, adds nothing to the class of debts which might be proved under paragraph *a* of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63*a*, to be liquidated as the court should direct.

"We do not think that by the use of the language in section 63*a* it was intended **to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove.**" (Insert ours.)

In re Pettingill & Co. et al., 137 Fed. 143, 145-147, it is stated:

"The court has, therefore, to consider if the claim of Peters against Pettingill at the time the petition was filed was a provable claim within section 63*a* of the bankrupt act. It cannot be brought within clauses (1), (2), (3), or (5). If provable, it must be so because it is a claim founded upon a contract within the definition of clause (4); but not every liability founded upon a contract can be proved in bankruptcy. This was decided of a covenant to pay an annuity to a woman *dum sola* (Dunbar *v.* Dunbar, 190 U. S. 340 • • •); and it has often been decided of covenants to pay rent, in so far as the rent accrues after bankruptcy. These claims are disallowed, not because they are not founded upon contract, but because at the filing of the petition, the time when the status of the claim is fixed, the damages arising from the breach of contract are so far contingent that they cannot be computed by any process known to law. • • •

"Some statutes of bankruptcy, indeed, by express language admit to proof some claims which could not be liquidated in any action at law or in equity brought at the time of bankruptcy. In some sense these statutes empower a court of bankruptcy, in the language of the Supreme Court in Dunbar *v.* Dunbar, to guess

at the creditor's damage. And this course has some advantages, for the bankrupt is thus relieved from liabilities which otherwise would hamper him after his discharge. The act of 1898, however, authorizes none of these guesses, and admits to proof only those claims which can be liquidated by legal proceedings instituted at the time of bankruptcy. Other liabilities of the bankrupt are deemed so far contingent that they cannot be proved in bankruptcy, nor are they released by the bankrupt's discharge.

* * * * * * *

"It sems, therefore, that the test of provability under the act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under section 63*b* * * *."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 575.

WILLIAM ELMER BROWN, Jr., *Petitioner*,

v.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, New Jersey, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF OF RESPONDENT.

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WILLIAM ELMER BROWN, JR., *Petitioner,*

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF OF RESPONDENT.

I.

SECTION 57n OF THE BANKRUPTCY ACT, AS AMENDED MAY 27, 1926, HAS NO APPLICATION TO THE INSTANT CASE.

On pages 7-9 of Petitioner's Reply Brief, he contends that a claim could have been filed in the bankruptcy proceedings of Petitioner within the six months' period provided for by section 57n of the Bankruptcy Act, as amended May 27, 1926 ((11 U. S. C., sec. 93n; app. p. 7).

(a) The effect of section 57n.

Section 57n of the Bankruptcy Act is in the nature of a statute of limitations, fixing the time within which claims

must be filed, with the consequence that if not filed within the required time they are barred. *J. B. Orcutt Co.* v. *Green*, 204 U. S., 96, 101, 102; *In re Harris Bros.*, 5 F. Supp. 191, 193; *In re Gellman*, 13 F. Supp. 643, 645; *In re Manning*, 4 F. Supp. 922; *In re Brill*, 52 F. (2d) 636, 637; *In re R. B. Rose Co.*, 43 F. (2d) 446, 447.

McClaine v. *Rankin*, 197 U. S. 154, 160, 162, has established, with reference to the application of statutes of limitation to assessment liability upon national bank stock, that a statute of limitations does not begin to run until the assessment has been levied, in that the liability does not become enforceable until made absolute by the levying of the assessment. See also *Pufahl* v. *Parks*, 299 U. S. 217, 222; *Forrest* v. *Jack*, 294 U. S. 158, 162.

From the foregoing it follows that in view of the fact that on the date of the adjudication of bankruptcy and even at the expiration of the six months' period provided for by the statute for filing claims no assessment had been levied or fixed against the Petitioner upon his stock in the Union National Bank, either by the Comptroller of the Currency or by a court in proceedings under section 65 of 12 U. S. C., the assessment liability was not affected by said section 57n as a statute of limitations.

(b) The filing of bankruptcy proceedings by Petitioner did not raise an obligation on the part of the Atlantic City National Bank to file proceedings against the Union National Bank to establish or enforce its claim against the latter bank and to fix the assessment liability of Petitioner.

The relation between the two banks was fixed by the contract of September 30, 1931. Under that contract it was contemplated that the Atlantic City National Bank would take over all assets of the Union National Bank for liquidation and it was not contemplated by either party that an accounting should be had between the two banks until Sep-

tember 30, 1933. It must also necessarily be inferred that the parties to the contract had in mind that the Union National Bank would go into voluntary liquidation. This position is supported by the fact that at the meeting of the stockholders of the Union National Bank on December 15, 1931, the contract of September 30, 1931, between the two banks was ratified, and the Atlantic City National Bank was designated liquidating agent (R. 35, 36). The foregoing being the situation, it is obvious that the act of going into voluntary liquidation on the part of the Union National Bank did not, and was not intended to, affect the relations of the parties otherwise than as indicated by the contract and the complementary resolutions of December 15, 1931, above mentioned.

From and after the expiration of the two-year period of liquidation preliminary to the accounting date fixing the deficit in the assets to meet the amount of liabilities of the Union National Bank assumed by the Atlantic City National Bank, (and incidentally fixing the indebtedness or liability of the Union National Bank to the Atlantic City National Bank) the Atlantic City National Bank unquestionably had the right to defer the enforcement of its claim or debt against the Union National Bank until just prior to the expiration of the State statute of limitations fixing the period within which an action to enforce the debt or obligation arising under the contract must be brought. The Atlantic City National Bank was entitled, at least during that period, to continue with the liquidation of the assets and apply the proceeds upon its claim against the Union National Bank.

The Atlantic City National Bank could thus defer within the limits of the applicable State statute of limitations the filing of proceedings under 12 U. S. C., sec. 65, to establish and have the Court fix such assessment liability of the shareholders of the Union National Bank as the Court, in the discretion necessarily vested in it by law, might determine to be necessary to meet the outstanding obligation of the Union National Bank to the Atlantic City National

Bank. Until such judgment should be rendered by the Court in such proceedings (so far as any action which might have been brought by the Atlantic City National Bank would be concerned) it necessarily results (following by analogy *McClaine* v. *Rankin*, *Pufahl* v. *Parks*, and *Forrest* v. *Jack*, *supra*) that the assessment liability of the stockholders of the Union National Bank would not become absolute and enforceable except by reason of the judgment of the Court determining, first, the necessity for an assessment and, second, the percentage or amount of assessment required to meet the claim of the Atlantic City National Bank against the Union National Bank.

It should also be borne in mind at this point that a creditor of an insolvent national bank does not have a direct claim against the stockholders thereof. The status of the stockholder in this connection is indicated by *McClaine* v. *Rankin*, *supra*, at page 161, wherein it is stated:

> "But the words of Sec. 5151 (12 U. S. C., Sec. 63) do not mean that the stockholder promises the creditor as surety for the debts of the corporation, *but merely impose a liability on him as secondary to those debts*, which debts remain distinct, *and to which the stockholder is not a party*. The liability is a consequence of the breach by the corporation of its contract to pay, and is collateral and statutory. (Italics and insert ours.)

It would seem obvious, in view of the foregoing, that the rights of the Atlantic City National Bank in the premises could not be affected by the entirely collateral fact that Petitioner, as the owner of ten shares of stock in the Union National Bank, filed personal proceedings in bankruptcy, and that in the absence of a judgment establishing and fixing assessment liability under the procedure above outlined the Atlantic City National Bank *could not* properly file proof of claim in the bankruptcy proceedings of Petitioner.

On page 8 of Petitioner's Reply Brief, he states that Slaughter, the former receiver of the Union National Bank, knew that a maximum assessment was to be made against

the Union National Bank before said assessment was levied. The Petitioner's statement in this connection is entirely immaterial and irrelevant so far as concerns the issues of the instant case, but it may be noted in passing that Petitioner fails to state that Slaughter had this knowledge on or about December 6, 1933, (R. 43-45) which was but seven days before the Comptroller of the Currency appointed a receiver for the Union National Bank and more than seven months after the Petitioner's adjudication in bankruptcy.

II.

CONCLUSION.

It is considered that the other matters dealt with in Petitioner's Reply Brief have either been adequately covered in Respondent's main Brief or else require no comment here.

In the final analysis, it would seem that there are two controlling issues before this Court:

(1) Whether the assessment liability levied in the instant case is statutory or contractual. If it is determined that the assessment liability is statutory, this disposes of the case. If it is found that the assessment liability is contractual, the remaining important question is—

(2) Whether the assessment levied by the Comptroller of the Currency on January 8, 1934, against Petitioner was discharged in the bankruptcy proceedings filed by him on April 21, 1933.

As to the latter question, Petitioner has not at any time questioned the *validity* of the assessment; he has not attempted in this or any other proceeding to have said assessment set aside; he merely contends that the assessment so levied cannot be effective as to him in view of his discharge in bankruptcy on July 31, 1933. It would seem entirely clear that the assessment levied on January 8, 1934, was not discharged by the bankruptcy proceedings of Petitioner filed on April 21, 1933, for the reasons herein stated and also more fully described in Respondent's main Brief.

On page 17 of Respondent's main Brief reference is made to annual reports of the Comptroller of the Currency to Congress showing national banks in receivership wherein depositors and creditors have been paid 100 per cent without the levy of an assessment. Reference was also made in this connection to 12 U. S. C., Sec. 197. As a matter of convenience there will be found in the appendix hereto extracts from the annual reports of the Comptroller of the Currency to Congress for the years 1929 to 1936, both inclusive, indicating the receivership banks wherein either no assessment at all was levied or less than 100 per cent assessment was levied. The page of the report in each instance is indicated with the exception of the report for 1936 which is not yet in printed form although it has been formally transmitted to Congress and is now being printed. The pertinent portions of the above-mentioned statute (12 U. S. C., Sec. 197) are also contained in the appendix.

Respectfully submitted,

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APPENDIX.

Section 57n of the Bankruptcy Act as amended May 27, 1926, (11 U. S. C. section 93n):

"Claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided,* That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer. (As amended May 27, 1926, c. 406, sec. 13, 44 Stat. 666.)"

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12 U. S. C. 197:

"Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section 192 and other sections of this Code, and when, as provided in section 194 thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association * * * At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, * * * the comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said comptroller and said receiver, or either of them; * * *"

Extracts from the Annual Reports of the Comptroller of the Currency for the years 1929 to 1936, both inclusive, showing the receiverships where assessments of less than 100 per cent were levied and, as a result of the liquidation, the amount of cash or assets which were returned to shareholders' agents under 12 U. S. C. sec. 197:

Page of Report	Year Ending	Bank and Location	Assessment	Assets Returned to Shareholders' Agents	Cash Returned to Shareholders' Agents
	10/31/29	None			
	10/31/30	None			
	10/31/31	None			
208	10/31/32	First N.B., Uniontown, Pa.	None		$800,000
	10/31/33	None			
370	10/31/34	First N.B., Buena Vista, Colorado	60%	$27,306	66
362	10/31/35	First N.B., Glenvil, Nebraska	None	27,385	1,165
366		First N.B., Havensville, Kansas	None	38,036	754
370		Hamilton Co. N.B., Cleves, Ohio	None	26,589	5,118
374		Brandon N.B., Brandon, Vermont	25%	59,227	20,254
	10/31/36	Standard N.B., Chicago, Illinois	50%	68,129	23,827
		Whiteland N.B., Whiteland, Indiana	None	34,437	2,249
		Farmers N.B., Garner, Iowa	None	31,458	4,351
		First N.B., Bellevue, Iowa	None	41,493	4,895
		First N.B. in Webster Grove, Iowa	None	71,521	7,267
		Harveysburg N.B., Harveysburg, Ohio	None	4,720	000
		First N.B., Bradford, Ohio	None	131,320	5,391
		First N.B., Dickinson, Texas	75%	19,767	299
		Wabash N.B., Wabash, Indiana	30%	000	10,360

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 575.—October Term, 1936.

William Elmer Brown, Jr., Petitioner, *vs.* Edward J. O'Keefe, Receiver of the Union National Bank of Atlantic City, New Jersey.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 29, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

In a suit for the enforcement of the personal liability imposed by the statute then in force upon shareholders in national banks, petitioner, the defendant in the suit, disclaimed liability, first, upon the ground that before the assessment of the shareholders his ownership of the shares was divested by the filing of a bankruptcy petition and the appointment of a trustee thereunder, and, second, upon the ground that if ownership continued, liability was extinguished by virtue of a discharge in bankruptcy. Whether the defense should have prevailed is now to be determined.

Petitioner was adjudicated a bankrupt on April 21, 1933, and on July 31, 1933, was granted a discharge. At the filing of the bankruptcy petition he was the owner of ten shares of stock of the Union National Bank of Atlantic City, New Jersey. Since September 30, 1931, the Union bank had been in course of voluntary liquidation (under R. S. §§ 5220 and 5221; 12 U. S. C. §§ 181, 182), the Atlantic City National Bank being the liquidating agent. The terms of liquidation are defined by an agreement. Union sold to Atlantic all its assets of every kind for $1,686,977.63, which the buyer was to pay through an assumption of the seller's liabilities. The seller covenanted that the assets had a value equal to the price, and bound itself to pay the deficiency, if any should ensue. To this there was to be an exception in the case of the banking house and fixtures, which were to be taken at a valuation of $353,000, irrespective of the outcome. The amount of the seller's liability was to be fixed at the expiration of two years (i.e. on September 30, 1933), at which time all notes then uncollected were to be reckoned as losses. Before that time arrived, the liquidating bank met with

troubles of its own. In January 1933, it was declared to be insolvent by the Comptroller of the Currency, and a receiver was appointed to wind up its affairs. In December, 1933, Union also was declared insolvent, and the receiver then appointed is the respondent in this court. Valuing the uncollected assets, the Comptroller found it necessary to enforce the personal liability laid upon the shareholders (R. S. § 5151; 12 U. S. C. § 63; 38 Stat. 273; 12 U. S. C. § 64), and by an order made and filed on January 8, 1934, assessed them to the amount of the par value of the shares. The receiver has sued the petitioner as one of the shareholders of Union to recover that assessment.

In defense of the suit petitioner asserts, as we have seen, that the ownership of the stock was divested by the bankruptcy, and also that liability was barred, if ownership remained. To estimate correctly the worth of these defenses we must have some other facts before us. The record shows that on October 27, 1933, by order of a referee, the trustee in bankruptcy was "authorized and directed to abandon all title to and to disclaim all the interest of the bankrupt in" the ten shares of Union National Bank, now the subject of this suit. There is no suggestion that in the interval between adjudication and disclaimer, the trustee had done anything betokening acceptance. The record also shows, in the form of an affidavit accepted by the court, that the bankrupt in his list of liabilities included the liability to assessment on his shares of Union stock, and that in his schedule of creditors he included Union and Atlantic as well as the receiver for Atlantic, then in charge of its affairs. The same affidavit tells us that promptly upon the transfer of the assets in September, 1931, the liabilities assumed by Atlantic were paid to the last dollar; that at the time of the defendant's bankruptcy Union had no debts or liabilities except the debt or liability to the liquidating agent; and that even before the bankruptcy the fact had been definitely ascertained that the liquidation of the Union assets would result in a deficiency which would require an assessment of the stockholders up to the maximum amount of the par value of the shares.[1] The estimate was not impracticable, for

[1] "At the time that I was adjudicated a bankrupt as aforesaid it had been determined and from then until now it has been definitely determined and known that said Union National Bank was insolvent. Said Union National Bank was throughout all of that time and ever since September 30, 1931, had been closed to business. Also at said time it had been determined and throughout said period it was definitely known that the assets of said Union National

about a year and seven months had passed since liquidation had begun, and only about five months were left before it would be deemed to be complete.

Upon these facts, established by the pleadings and supporting affidavits, the receiver moved for judgment. The District Court held the defenses insufficient, and gave judgment against the defendant for the amount of the assessment. 16 F. Supp. 494. There was an appeal to the Court of Appeals for the Third Circuit where the judgment was affirmed. 85 F. (2d) 885. An important question of bankruptcy law being involved, a writ of certiorari issued from this court.

We dismiss with a few words the petitioner's contention that at the moment of the bankruptcy he lost the title to the shares, and became relieved thereby of the liabilities attendant upon ownership, though his name was left continuously on the stock book of the bank. Cf. *Richmond* v. *Irons*, 121 U. S. 27, 58; *Matteson* v. *Dent*, 176 U. S. 521. Whatever title or inchoate interest may have passed to the trustee was extinguished by relation as of the filing of the petition when the trustee informed the court that the shares were burdensome assets, and was directed by the court to abandon and disclaim them. *American File Co.* v. *Garrett*, 110 U. S. 288, 295; *Sparhawk* v. *Yerkes*, 142 U. S. 1, 13; *Sessions* v. *Romadka*, 145 U. S. 29, 39; *Dushane* v. *Beall*, 161 U. S. 513; *First National Bank* v. *Lasater*, 196 U. S. 115. In such case "the title stands as if no assignment had been made." *Sessions* v. *Romadka, supra*, p. 52. Cf. *Mills Novelty Co.* v. *Monarch Tool & Mfg. Co.*, 49 F. (2d) 28, 31; *In re Frazin*, 183 Fed. 28, 32; *Kirstein Holding Co.* v. *Bangor Veritas, Inc.*, 131 Me. 421, 424. A precise analogy is found in the law of gifts and legacies. Acceptance is presumed, but rejection leaves the title by relation as if the gift had not been made. See *Albany Hospital* v. *Albany Guardian Society*, 214 N. Y. 435, 441, 442, collecting many cases. For the purposes of the case at hand the result will be the same whether title is conceived of as remain-

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Bank were insufficient in value to liquidate at a sum equal to the value placed upon them by said agreement of September 30, 1931.

"Also at the time that I was adjudicated a bankrupt as aforesaid it had been determined and from then until now it has been definitely determined and known that an assessment and requisition upon the shareholders of said Union National Bank to the total par value of the amount of stock outstanding would be necessary to pay the debts and claims of said bank." Extracts from petitioner's affidavit.

ing in the bankrupt or as afterwards reverting. *Albany Hospital* v. *Albany Guardian Society, supra,* pp. 443, 445. In either view it is his after disclaimer by the trustee, wherever it may have been while acceptance was uncertain. *American File Co.* v. *Garrett, supra.*

The petitioner being held to be the owner of the shares, we pass to the closer question whether the effect of the discharge in bankruptcy was to extinguish the personal liability that was attached to his ownership as a statutory incident.

Liabilities are not discharged in bankruptcy unless claims thereon exist in favor of claimants whose identity is determinable at the date of the petition. *Zavelo* v. *Reeves,* 227 U. S. 625, 631; *Everett* v. *Judson,* 228 U. S. 474, 479. If the Union bank at that date had been a going concern, the possibility that it might later become insolvent or resort to liquidation, would not have furnished an occasion for stripping the shares of their statutory incidents by the device of a discharge in bankruptcy. In such a situation there would be no claim to be proved and no one capable of proving it. But at the date of this petition, the Union bank was not a going concern with the liability of shareholders a latent possibility. It was in course of liquidation by a voluntary liquidator. Not only was it in liquidation, but according to the evidence it was already known to be insolvent. Liquidation coupled with insolvency is the critical event which is capable of transforming a potential liability into one presently enforcible, as soon as a qualified claimant appears upon the scene. The method of winding up determines who the spokesman for the claim shall be. If a bank is in course of liquidation by the Comptroller of the Currency, the personal liability of stockholders is enforcible upon the direction of the Comptroller, at the suit of a receiver. Act of June 30, 1876, c. 156, § 1, 19 Stat. 63; 12 U. S. C. § 191. Cf. 12 U. S. C. §§ 63, 64. If the bank is in course of liquidation by a voluntary liquidator, the liability is enforcible by a creditor or creditors, suing for themselves and for others similarly situated. Act of June 30, 1876, c. 156, § 2, 19 Stat. 63; 12 U. S. C. § 65. Cf. 12 U. S. C. § 181. We have no occasion to inquire whether in the absence of an assessment by the Comptroller of the Currency the statutory liability may be enforced by a receiver through the medium of a claim in bankruptcy. Cf. *Erickson* v. *Richardson,* 86 F. (2d) 963. That question is not

here. An assessment by the Comptroller, even if a necessary preliminary to a suit by a receiver when a bank is in the course of involuntary liquidation, is not a condition precedent, in cases of voluntary liquidation, to proceedings in behalf of creditors. No adequate reason occurs to us, and none, we think, is stated in the arguments of counsel, why a court of bankruptcy is then incompetent to liquidate the amount of the indebtedness effectively and speedily, and give relief accordingly. Cf. *Cunningham* v. *Commissioner of Banks,* 249 Mass. 401, 426; *United States* v. *Illinois Surety Co.,* 226 Fed. 653, 662-663.

In saying this we are not unmindful that a comprehensive suit in equity is commonly the proper remedy against shareholders where insolvency becomes manifest in voluntary liquidation. 12 U. S. C. § 65. The remedy does not exclude the presentation of a proof of claim in bankruptcy, the amount to be liquidated under the direction of the court by bill in equity or otherwise. *Cunningham* v. *Commissioner of Banks, supra; United States* v. *Illinois Surety Co., supra; King* v. *Pomeroy,* 121 Fed. 287; *Irons* v. *Manufacturer's Nat. Bank,* 17 Fed. 308, 314; 27 Fed. 591. Cf. *Hightower* v. *American Nat. Bank,* 263 U. S. 351; *Wyman* v. *Wallace,* 201 U. S. 230. By the mandate of the statute (Bankruptcy Act § 63b; 11 U. S. C. § 103b): "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate." The result is to invest the court with a discretionary power that can be fitted to the needs of varying situations. *Maynard* v. *Elliott,* 283 U. S. 273. Cf. *Foust* v. *Munson S. S. Lines,* 299 U. S. 77, 83. A holding that a creditor is disabled from making proof in bankruptcy till a suit in equity against the shareholders has been brought to a decree would have unfortunate results. Today it is the bankrupt who is asserting the provable quality of such a claim in order to preserve for himself the benefit of a discharge. Tomorrow it may be a creditor who unless he is given that opportunity may lose his dividend from the assets and find his suit in equity illusory. In that predicament the malleable processes of courts of bankruptcy give assurance of a remedy that can be moulded and adapted to the needs of the occasion. *Cunningham* v. *Commissioner of Banks, supra.*

Liquidation being possible, the claim is not defeated though there was uncertainty as to its amount at the filing of the petition. *May-*

nard v. *Elliott, supra.* Yet even the amount was certain, if we are to credit the defendant's statement. By this it appears that long before the bankruptcy the necessity for an assessment to the amount of the par value of the shares had become obvious to the liquidating agent and indeed to all concerned. The facts are far removed from those in *Miller* v. *Irving Trust Co.*, 296 U. S. 256, where the claim had its origin in the covenants of a lease. For historical causes such covenants are *sui generis* (*Manhattan Properties* v. *Irving Trust Co.*, 291 U. S. 320; *Gardiner* v. *Butler & Co.*, 245 U. S. 603), but the analogy is still imperfect if that distinction be ignored. There the only cause of action belonging to the claimant was for a deficiency that was dependent upon unpredictable events.[1] Here the progress of the liquidation had already brought about a deficiency too great to be corrected by any unexpected windfall. This at least is the situation as the petitioner describes it. What infusion of contingency will vitiate a claim is at best a question of degree (*Maynard* v. *Elliott, supra*, p. 278), though there is a leaning toward allowance in aid of the purpose of the statute to relieve the honest debtor. *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, 554-555; *Central Trust Co.* v. *Chicago Auditorium*, 240 U. S. 581, 591. To all this we add that the uncertainty, if there was any, as to the exact amount of the assessment was to be dispelled at the farthest by September 30, 1933, less than six months later, for obligations then unpaid were to be classified as losses. Cf. Bankruptcy Act, § 57n; 11 U. S. C. § 93n. Upon the facts of this case the impediments to a prompt ascertainment of the liability of shareholders were unsubstantial, if not imaginary.

Other objections are made to the operation of the discharge, but they need not detain us long.

There is argument that a claim against a stockholder is not provable in bankruptcy for the reason that it is founded on a statutory liability not subject to discharge. Bankruptcy Act § 63; 11 U. S. C. § 103. True indeed it is that the liability is created by a statute, and not solely by agreement. *McClaine* v. *Rankin*, 197 U. S. 154, 159, 161; *Christopher* v. *Norvell*, 201 U. S. 216, 225, 226. No disclaimer by the stockholder would be effective to avoid it. Even

[1] "Under the clause in question, it was, at the time the petition in bankruptcy was filed, uncertain, a mere matter of speculation, whether any liability ever would arise under it." Miller v. Irving Trust Co., 296 U. S. 256, 258.

so, the liability, created though it is by statute, is quasi-contractual in its origin and basis. *Chisholm* v. *Gilmer*, 299 U. S. 99, 102; *Shriver* v. *Woodbine Bank*, 285 U. S. 467, 477; *Coffin Brothers* v. *Bennett*, 277 U. S. 29, 31; *Bernheimer* v. *Converse*, 206 U. S. 516, 529; *Christopher* v. *Norvell, supra; McClaine* v. *Rankin, supra*, p. 159; *McDonald* v. *Thompson*, 184 U. S. 71, 74. Cf. *Erickson* v. *Richardson, supra*. It is an incident affixed by law to the contract of membership between shareholder and bank. *Ibid.* A liability upon quasi-contract is one upon an "implied contract", and so provable in bankruptcy (Bankruptcy Act § 63 (4); 11 U. S. C. § 103 (4); *Crawford* v. *Burke*, 195 U. S. 176; *Tindle* v. *Birkett*, 205 U. S. 184; *Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328, 331), if the other conditions of allowance are found to be fulfilled.

Finally argument is possible that the discharge is ineffective against the creditors of the bank for the reason that only a single creditor of Union was listed in the schedules. This, however, is unimportant if the creditor so listed (the liquidating agent) was in fact the only creditor, as the petitioner insists it was. Cf. *Longfield* v. *Minnesota Savings Bank*, 95 Minn. 54. If in fact there were other creditors whose names have been omitted, the burden rests on the respondent to make proof of such omission. *Hill* v. *Smith*, 260 U. S. 592, 595. The conclusion may well follow, if the omission shall be proved, that as to any creditors not listed the discharge is without effect.

Whether the petitioner will be able to make good the allegations of his answer, amplified and explained by the supporting affidavits, is not to be predicted now. Enough for present purposes that there are issues to be tried.

The decree should be reversed and the cause remanded for further proceedings in accord with this opinion.

Ordered accordingly.

A true copy.

Test:

Clerk, Supreme Court, U. S.